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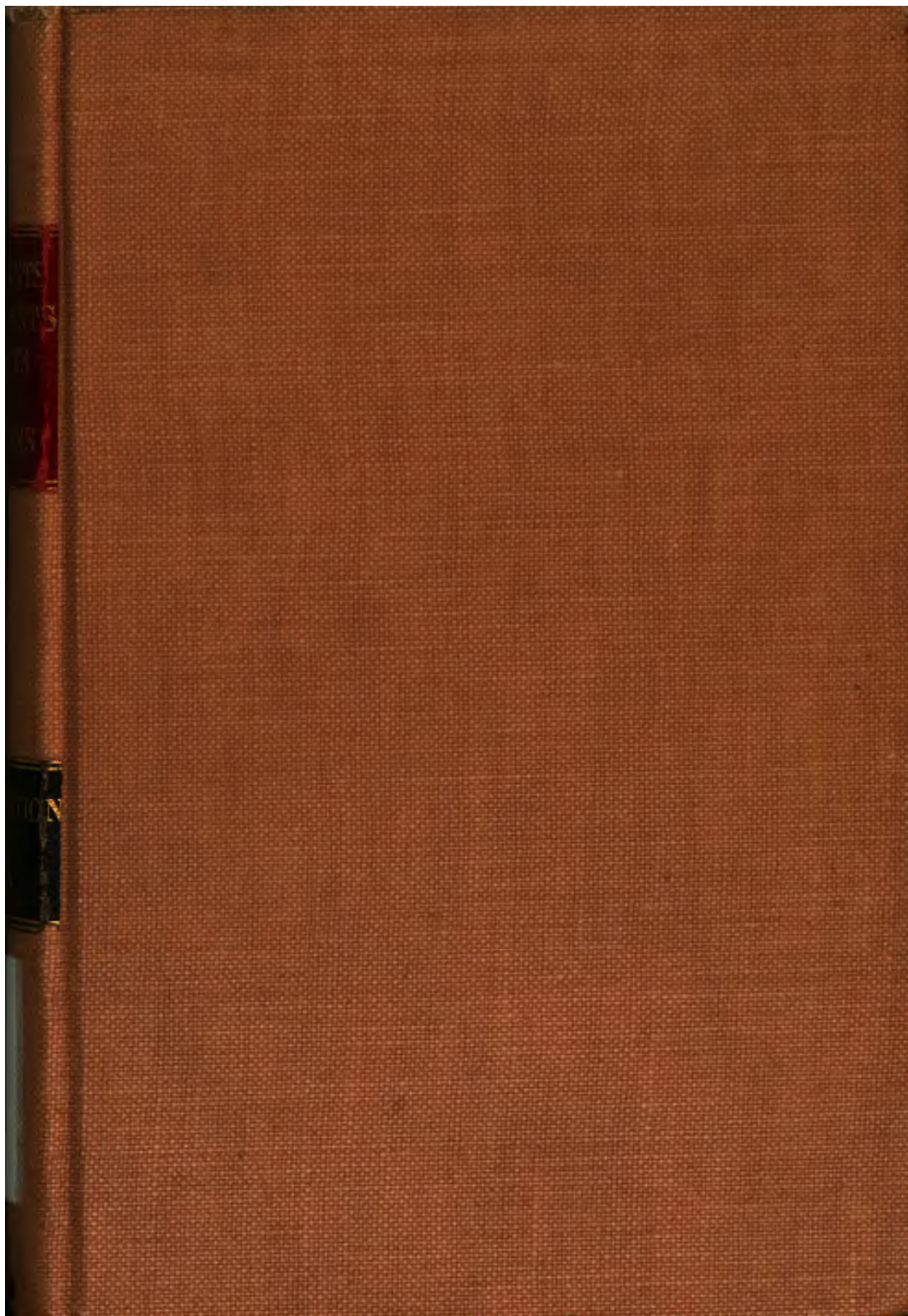
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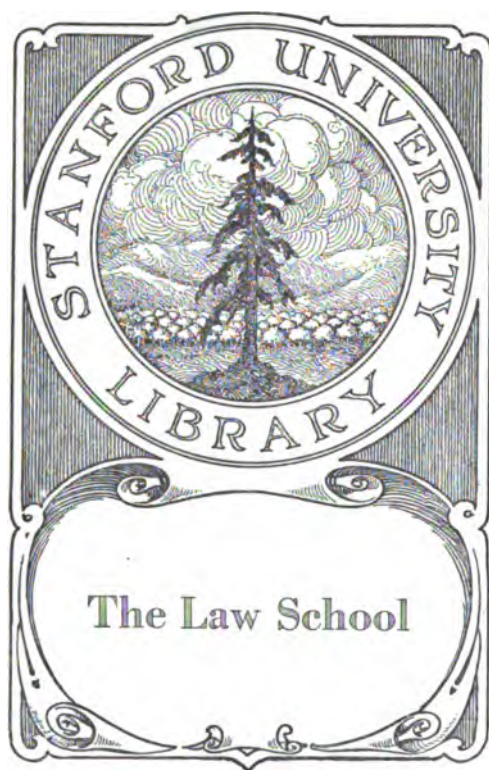
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LEADING AND ILLUSTRATIVE CASES

WITH NOTES ON THE LAW OF

Judgments, Attachments, Garnishments
and Executions

SECOND EDITION

BY

JOHN R. ROOD

GEO. WAHR, PUBLISHER AND BOOKSELLER
ANN ARBOR, MICHIGAN
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YRABEL GROMATZ

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PREFACE

The prior edition being exhausted, this one became necessary. The scope of the book has been considerably changed by developing the law of jurisdiction and the estoppel by judgments. Room for this has been obtained by dropping some of the less important cases on other topics. In several instances a case has been displaced by another on the same point, because thought to cover the matter better.

Ann Arbor, Sept. 27, 1909.

JOHN R. ROOD.

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ESSENTIALS OF JURISDICTION

JURISDICTION DEPENDING ON THE CONSTITUTION OF THE COURT.

The Government Creating the Court.

THE NUEVA ANNA and THE LIEBRE: THE SPANISH CONSUL, CLAIMANT, in U. S. Sup. Ct., 1821—19 U. S. (6 Wheaton) 193.

APPEAL from the District Court of Louisiana. These were the cases of the cargoes of two Spanish ships, captured and condemned by a pretended court of admiralty at Galveston, constituted by Commodore Aury, under the alleged authority of the Mexican republic. The goods were, after this condemnation, brought into the port of New Orleans, and there libelled by the original Spanish owners, in the district court. That court, decreed restitution to the original owners, and the captors appealed to this court.

February 26th, 1821. This cause was argued by *Hopkinson*, for the respondents and libellants; no counsel appearing for the appellant and captors.

The court stated, that it did not recognize the existence of any court of admiralty, sitting at Galveston, with authority to adjudicate on captures, nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state, at war with Spain; so that the court could not consider as legal, any acts under the [*194] flag and commission of such republic or state. But, as the record, in this case, stated the capture to have been made under the flag of Buenos Ayres, it became necessary to send back the case, in order to ascertain under what authority it was in fact made.

Sentence reversed, and cause remanded for further proceedings.

TREVINO v. FERNANDEZ, in Texas Sup. Ct., 1855—13 Texas 630.

Trespass to try title to land along the east bank of the Rio Grande River. Plaintiffs appeal from judgment for defendants. Plaintiffs claimed as heirs of Bartolome Fernandez by virtue of

a land grant to Bartolome and Eugenio Fernandez, brothers, alleging that Bartolome had paid all the purchase money, and that Eugenio had abandoned and relinquished all his interest to Bartolome. The defendants admitted the grant, denied that Eugenio had relinquished his rights, claimed title as heirs of Eugenio, and pleaded judgment of the tribunal of justice of the state of Tamaulipas, rendered in their favor in 1842 (during the time that the land in question was claimed as conquered territory by the Republic of Texas, but while still in the actual occupation and control of the Mexican government) in pursuance of which they had been judicially put in possession of one-half of the land in question.

HEMPHILL, C. J. * * * [*662] * * * It is, however, contended by defendants that their title to ownership of the land and the rights of the parties were determined by a decree of the Court of the First Instance in Matamoras, some time in the year 1842, in which half of the tract was adjudged to the present defendants, and that this was duly carried into effect by a survey and division of the tract, and by placing the defendants in possession of the portion assigned to them.

One of the objections urged to this decree is, that it was made by a foreign court having no jurisdiction over the person or subject matter, and that this court is bound by the political action of the authorities of the republic, which on the 19th December, 1836, defined its boundaries, extending them to the Rio Grande, and that this excluded the jurisdiction or authority of the courts of Tamaulipas over any lands lying within those limits. On the other hand, it is insisted by defendants, that the country lying between the Neuces and the Rio Grande, though claimed by Texas, was not actually conquered until 1846, and that until that time this territory, and especially the portion bordering on and adjacent to the Rio Grande, remained in the possession of, and under the laws, control, and government, of the Republic of Mexico, and that [*663] consequently all the acts of that government or its authorities in the administration of its laws, and in the regulation of its municipal affairs, so far as the same affected the rights of individuals with each other, are as valid and binding as if done in the exercise of competent authority.

This is a subject of some difficulty and of considerable interest doubtless to the country adjacent to the Rio Grande. For it is only in relation to this region that the operation of these

principles will be considered, the actual possession and control of the Mexican authorities being restricted, in fact, to limits at society cannot be otherwise secured." * * (*

Pena y Pena, the illustrious chief justice of the Supreme Court of Mexico, in his "Practica Forence," in treating of the validity of judgments or acts of judicial officers who are reputed to have competent authority, though in fact they had none, [*665] applies the doctrines recognized in such cases to the acts of judicial officers during the period of revolutionary disturbances, when such officers are changed at every change of fortune, and as the one party or the other may have the predominance, says, that all judicial acts done or authorized by an illegitimate authority (meaning a government *de facto*) might be regarded as null, and of no validity or effect, if the strict principle of law were alone considered; but the essential good of the nation, and the peace and tranquillity of its citizens, in relation to a branch so important as the judicial, demand that these should be legalized, and be held as valid and subsisting, since if it were not so, a door would be opened to an innumerable multitude of complaints, reclamations, and attempts to undo all that had been done, so that nothing would be solid and stable; the fortune and the property of the citizens would be consumed in the renewed expenses and damages which the multitude of suits would inflict: and the people would be buried in a terrible chaos of judicial anarchy, more transcendental and pernicious than the illegitimate domination which it was designed to repudiate. (Vol. 2, p. 81.) It appears that a number of treatises were written on this subject, with reference to the effect of the acts of the French authorities in Spain during the period of the French conquests; and from the author of a work entitled an "Examination into the Crimes of Infidelity to the Country, imputed to Spaniards who submitted to the authority of the French Government," a long extract is taken by Pena y Pena, from which we cite the following, viz:

"It is madness to suppose that a nation could exist (which would not conflict with and destroy itself) without public administration, and without laws; and it is a dream to pretend that it could be governed by laws distinct from those given by the government that has the power. There is but one of two alternatives; either that there should be no judicial proceedings among a conquered people, and all actions, beneficial or mischievous, be alike permitted, and all transgressions and crimes pass with impunity; or judicial proceedings [*666] must be tried and deter-

mined by the laws of the conqueror. The first proposition is inadmissible, as by it society would be ruined, and the second must not only be tolerated, but sanctioned, as the welfare of society cannot be otherwise secured." * * *

From these authorities it is manifest that the acts of the government in actual possession, in the ordinary administration of its laws, so far as they affect private rights, are valid, and can be set up to support an action or defend a right. Those affecting public rights are void and cannot be enforced. The objection to the judicial proceedings, then, under which it is claimed that the rights of these parties to this land have been adjudicated, on the supposed ground of the want of authority in the court over the subject matter, is not tenable. * * *

Reversed and re-formed.

Judicial Nature of Body.

STENBERG v. STATE *ex rel.* KELLER, in Neb. Sup. Ct., May 6, 1896—
48 Neb. 299, 67 N. W. 190.

Writ of error to reverse an order of the district court of Douglas county granting a peremptory mandamus to compel Stenberg and others as the board of county commissioners to cause a warrant to be issued on the county treasurer in favor of Keller and another in payment of a judgment recovered in said district court by them against said board for \$4,832.62 and costs, for moneys paid by Keller and the other to the county for part of the county poor farm sold them by the county board of commissioners without authority. The proposition to sell had been submitted to the voters of the county, and had been approved by a majority of the electors voting on the proposition, but not by a majority of the electors voting at that election, as required by law. Stenberg and his companions claimed that the judgment required to be paid is void for want of jurisdiction, because it was rendered on appeal from the order of the board of county commissioners denying the claim, and that the board in originally approving the sale and afterwards in denying the claim for repayment of the money acted judicially, was bound by its original action, and so was without power to allow the claim, and by the appeal the district court acquired no greater power.

NORVAL, J. * * * [*307] If the county board has no power or authority to act in the premises, it is very evident that the district

court obtained none; and so say the authorities. *Brondberg v. Babbott*, 14 Neb. 517, 16 N. W. 845; *Railway Co. v. Ogilvy*, 18 Neb. 638, 26 N. W. 464; *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79; *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363; *Keeshan v. State*, 46 Neb. 155, 64 N. W. 695. This rule obtains in other states. See authorities cited in brief of plaintiffs in error [*Stringham v. Board*, 24 Wis. 594; *Plunkett v. Evans*, 2 S. D. 434, 50 N. W. 961; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246, 39 N. W. 85; *Town of Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. 547; *Fitzgerald v. Beebe*, 7 Ark. 305]. It is equally well settled that a county board has exclusive original jurisdiction in the examination and allowance of most claims against the county. No original action can be maintained against a county upon a claim or demand properly cognizable for audit and allowance before the county board. As to all such the jurisdiction of the district court is appellate merely. *Brown v. Otoe Co.*, 6 Neb. 111; * * * *State v. Merrell*, 43 Neb. 575, 61 N. W. 754. * * *

It has often been held in this state that a county board, in examining and passing upon claims against the county, acts judicially, and the allowance or rejection by it of a claim has the force and effect of a judgment, unless reversed or set aside by appellate proceedings. *State v. Buffalo Co.*, 6 Neb. 454; *Brown v. Otoe Co.*, Id. 111; *State v. Churchill*, 37 Neb. 702, 61 N. W. 754; * * * *State v. Vincent*, 46 Neb. 408, 65 N. W. 50. But we are unable to agree with counsel for respondents that county boards are courts [*312] in a constitutional sense, or within the general acceptance of that term. They are not created courts by the constitution; nor does the present law establishing county boards and defining their duties and powers constitute them courts. They are merely legislative and administrative bodies, with limited powers, created for the transaction of county business—exercising in some matters, it is true, functions judicial in their nature, and appeals lie from their decisions, in certain matters, provided for; but that does not make them courts. So, too, officers not judicial sometimes are clothed with judicial powers. A county superintendent of schools exercises *quasi* judicial functions in the changing of the boundaries of school districts, and an appeal may be taken from his decisions; yet there is no superintendent's court. The state auditor, in the audit and allowance of claims, acts judicially, and the right to appeal is given; but that does not constitute an auditor's court. Many other instances might be mentioned where judicial power to a limited extent is lodged in the hands

of different officers for specific purposes. "A court is a body in the government organized for the public administration of justice at the time and place prescribed by law." 4 Am. & Eng. Enc. Law 447. County boards do not fall within this definition. They cannot issue subpoenas for witnesses. The rules of law governing the admission of testimony in the courts are not usually followed before county boards in passing upon claims. Such boards often act without testimony, and receive, and consider sufficient, evidence inadmissible in courts of justice. County boards do not render judgments. The allowance or rejection of a claim from which no appeal has been prosecuted has merely the effect of one. The statute in no place refers to such boards as courts. Nor does the fact that the law requires each county board to procure a seal constitute it a court. Such seal is expressly made by the legislature the seal of the county, and not that of the board, as a court or judicial tribunal. That it [*313] is obligatory upon county commissioners to hold their sessions at the court-house, for the transaction of the business of the county, is not significant. The county treasurer and other county officers are required to hold their offices in the same building. * * * True, this statute, as well as the prior ones upon the same subject, authorized county boards to preserve order, and punish contempts by fine and imprisonment; yet that did not have the effect to create such boards judicial tribunals. Each house of the legislature possesses powers to punish for contempts in certain cases; but this falls far short of constituting it a court. The authority to punish for contempt is not conferred alone upon a judge or court. A notary public may commit a witness for contempt who refuses to give his deposition. *Dogge v. State*, 21 Neb. 272, 31 N. W. 929. * * *

The judgment is affirmed.

The Validity of the Law Creating the Court.

NORTON v. SHELBY COUNTY, in U. S. Sup. Ct., May 10, 1886—118
U. S. 425, 6 Sup. Ct. Rep. 1121.

Action against Shelby county, Tenn., on bonds and the annexed coupons issued March 1, 1869, by the county board of commissioners, to the Mississippi River R. Co., by virtue of an act of the legislature of Feb. 25, 1867, authorizing such board to make such bonds. From judgment for defendant in the Cir-

cuit Court of the United States for the Western District of Tennessee, the plaintiff brings error.

FIELD, J. * * * The defendant contends: (1) that the commissioners were not lawful officers of the county, and that there was no such office in Tennessee as that of county commissioner; (2) that there could not be any such *de facto* officers, as there was no such office known to the laws, and therefore that the subscription was made, and the bonds were issued, without authority and are void; and (3) that the action of the commissioners was never ratified, and was incapable of ratification, by the county. * * *

[*441] The decision of the Supreme Court of Tennessee as to the constitutional existence of the board of commissioners of Shelby County is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of the peace of the county; and that their action in holding the county court was utterly void. This court could neither gainsay nor deny the authoritative character of that determination. It follows that in the disposition of the case before us we must hold that there was no lawful authority in the board to make the subscription to the Mississippi River Railroad Company and to issue the bonds of which those in suit are a part.

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose

interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. [*442] It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

In *Hildreth v. M'Intyre*, 1 J. J. Marsh. 206, 19 Am. Dec. 61, we have a decision from the Court of Appeals of Kentucky which well illustrates this doctrine. The legislature of that state attempted to abolish the court of appeals established by her constitution and create in its stead a new court. Members of the new court were appointed and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional court of appeals. The question was whether the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another, whether they were judges of the court of appeals and the person acting as their clerk was its clerk. The court said: "Although they assumed the functions of judges and clerk, and

attempted to act as such, [*443] their acts in that character are totally null and void unless they had been regularly appointed under, and according to, the constitution. A *de facto* court of appeals cannot exist under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the constitution shall exist; and that must necessarily be a court '*de jure*.' When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and a *de facto* legislature must be recognized as valid. But this is required by political necessity. There is no government in action except the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them, to others who, sustained by a power above the forms of law, claim to act, and do act, in their stead. But when the constitution or form of government remains unaltered and supreme, there can be no *de facto* department, or *de facto* office. The acts of the incumbents of such departments or office cannot be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution there can be no such political solecism in Kentucky as a '*de facto*' court of appeals. There can be no such court whilst the constitution has life and power. There has been none such. There might be under our constitution, as there have been, '*de facto*' officers. But there never was and never can be, under the present constitution, a '*de facto*' office." And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed.

In some respects the case at bar resembles this one from Kentucky. [*444] Under the constitution of Tennessee there was but one county court. That was composed of the justices of the county elected in their respective districts. The commissioners appointed under the act of March 9, 1867, by the governor were not such justices, and could not hold such court, any more than the legislative tribunal of Kentucky could hold the court of

appeals of that state. In *Shelby County v. Buterworth* [unreported], from the opinion in which we have already quoted, Chief Justice Nicholson, speaking of the claim that Barbour Lewis, the president of the board of county commissioners, was a *de facto* officer, after referring to the decisions of the supreme court of the state holding that the board of commissioners was an illegal and unconstitutional body, said: "This left the organization of the county court in its former integrity, with its officers entitled to their offices and creating no vacancy to be filled by the illegal action under the act of 1867. It follows that Barbour Lewis could not be a *de facto* officer, as there was no legal board of which he could be president, and as there was no vacancy in the legal organization. The warrants issued by him show the character in which he was acting, and repel the presumption that he was a *de facto* officer. He could be under the circumstances, as we can judicially know from the law and pleadings in the case, nothing but a usurper. There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*."

Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is [*445] enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the Supreme Court of Michigan, in *Carleton v. the People*, 10 Mich. 250, 259, "where there is no office there can be no officer *de facto*, for the reason that there can be none *de jure*. The county offices existed by virtue of the constitution the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required when there is an office to make an officer *de facto*, is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for

that would make him an officer *de jure*. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact."

The case of *The State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, decided by the Supreme Court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a landmark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto*, and, as such, his acts were valid. The opinion of Chief Justice Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto*:

[*446] "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons; where the duties of the office are exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

Of the great number of cases cited by the chief justice none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the chief justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made. * * *

[*454] * * * If they [the people of the county] obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit, and as that cannot be sustained, the judgment below must be

Affirmed.

BURT v. WINONA & ST. P. R. CO., in Minn. Sup. Ct., Jan. 28, 1884—
31 Minn. 472, 18 N. W. 285.

GILFILLAN, C. J. After the appeal in this case had been argued and submitted, but before it was decided, the defendant applied to the court asking it to "disaffirm" the judgment appealed from, on the alleged ground that the court rendering it is not a legal court, and its judgment therefore a nullity, because the act assuming to establish it, to wit, the act of November 22, 1881, entitled "An act to establish a municipal court in the city of Mankato, Blue Earth county, Minnesota," did not receive a vote of two-thirds of the entire senate in its passage through that body, and, consequently, did not pass according to the requirements of the constitution as construed by the court at this term in the case of *State v. Gould*, 31 Minn. 189.

To establish the fact, it refers to the journal of the senate, and claims that the courts take judicial notice of the journals of the legislature in respect to the passage of bills. The plaintiff answers that the court, if not a *de jure*, was at least a *de facto*, court, and its acts and judgments cannot be impeached collaterally for want of legality in the court itself, nor its legal existence be called in question, except in a direct proceeding on behalf of the state for that purpose, as was the case in *State v. Gould*, *supra*.

[*475] The argument of the defendant is that a judgment rendered without jurisdiction is void; that want of jurisdiction may always be shown; that if the legislative act under which a court assumes to act as such be void, there is a want of jurisdiction; and that, this act being void, there was no jurisdiction. Ordinarily, if the record shows that a court has assumed jurisdiction over a matter not committed to it by the constitution or some valid statute, it may be inquired into, and the excess of jurisdiction corrected or annulled on appeal from its judgment. The defect here alleged is in the non-existence in the law of the court itself. That presents a somewhat different case from an exception to the right of a court, admitted to exist, to try a particular matter. The latter is permitted, while public policy may prohibit the other.

The rule that the acts of *de facto* officers cannot be questioned collaterally includes the acts of judicial as fully as of other officers. In *State v. Brown*, 12 Minn. 448, (538,) the court held that the judge who held the court below, at the trial of the defendant, was at least a *de facto* officer, and that, until his right to the office should be determined in a direct proceeding for that purpose, it could not be questioned in a collateral proceeding. Many of the definitions of a *de facto* officer in the text-books and decided cases assume that there can be no *de facto* officer, except in a *de jure* office; and Dillon on Mun. Corp. § 276, (214,) goes so far as to say, "in order that there may be a *de facto* officer, there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and therefore a person cannot claim to be a *de facto* officer of a municipal corporation, when the corporation or people have in law no power, in any event, to elect or appoint such an officer."

Whether there can be a *de facto* office—a *de facto* court—is the important question in the case, and it is one of no small difficulty; while there have been a great many cases in which it was attempted to call in question, in a collateral proceeding, the legal right of an officer to hold an office, there have been few where the legal existence of the office itself was contested. The reason given for the *de facto* doctrine applies as well to offices and courts as to officers. Said the court in [*476] *State v. Carroll*, 38 Conn. 449, 467: "The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duties of an

office without being lawful officers." It would be a matter of almost intolerable inconvenience, and be productive of many instances of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy. Taking even the narrowest definition of an officer *de facto*, viz., that he is one who is exercising the duties of an office under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is, under color of law. That there may be a *de facto* municipal corporation, and consequently *de facto* offices of the same, follows from the rule laid down in *Cooley*, Const. Lim. *254: If a municipal corporation appears "to be acting under color of law and recognized by the state as such, such a question (that is of the legal existence of the corporation) should be raised by the state itself by *quo warranto*, or other direct proceeding"—and it is sustained by many authorities, holding that the question cannot be raised collaterally. *State v. Carr*, 5 N. H. 367; *People v. Maynard*, 15 Mich. 463; *Stuart v. School-dist.*, 30 Mich. 69; *Bird v. Perkins*, 33 Mich. 28; *President, etc., v. Thompson*, 20 Ill. 197; *Kettering v. City of Jacksonville*, 50 Ill. 39; *Town of Geneva v. Cole*, 61 Ill. 397; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *State v. Weatherby*, 45 Mo. 17; *City of St. Louis v. Shields*, 62 Mo. 247; 1 Dillon on Mun. Corp. § 43, (22.)

In *Secombe v. Kittelson*, 29 Minn. 555, the court held, in effect, that there might be a *de facto* state government.

In the line of these authorities are the only two cases we have found in which an attempt was made to contest collaterally the legal existence of a court. *Fraser v. Freelon*, 53 Cal. 644, was *certiorari* to review the proceedings of the municipal court of appeals of San Francisco in a private action. An attempt was made to draw in [*477] question the legality of that court. The supreme court, after referring to the rule in case of a *de facto* officer, said (647): "It is manifest that the question whether the office itself, which was attempted to be created by statute, has a legal existence, is of vastly more importance and of greater interest to the public than the question of the right of the incumbent," and held that the question could not be raised except in an action or proceeding by the state. *State v. Rich*, 20 Mo. 393, 397, was an appeal from a judgment of the Lawrence county circuit court, quashing an indictment found in and removed into

it from the Stone county circuit court, on the ground that the latter county had not been constitutionally established, and consequently there could be, in point of law, no such court as the Stone county circuit court where an indictment could lawfully be found. The supreme court held (397) that "all such inquiries must be excluded whenever they come up collaterally, and the county, its courts and officers, must be treated as things existing in fact, the lawfulness of which cannot be questioned, unless in a direct proceeding for that purpose." In view of these authorities, and of the reason that underlies the rule applied to acts of persons in the actual exercise, under certain circumstances, of the duties of public officers, and of the great public mischiefs that might sometimes arise but for the application of the rule to courts, we arrive at the conclusion that there may be *de facto* courts or offices, the legality of whose existence cannot be questioned, except in a direct proceeding by the state for that purpose.

We need not in this case attempt a definition to cover all instances of a court of office *de facto*. It is enough to determine upon the particular facts of this case. But we may go so far as to lay down this proposition, that where a court or office has been established by an act of the legislature apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a *de facto* court or office—in other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions.

It remains only to apply the principle to the case in hand. In *County of Ramsey v. Heenan*, 2 Minn. 281, (330,) it being alleged that a certain law had not passed the two houses in the manner prescribed [*478] by the constitution, the court decided that it was to be tried by the court and not by a jury, and that it might inspect the original bills on file with the secretary of state, and have recourse to the journals of the legislature, to ascertain whether or not the law had received all the constitutional sanctions to its validity. And in *State v. City of Hastings*, 24 Minn. 78, upon a similar question, it was decided that the effect of signing the enrolled bill by the presiding officers of the two houses, as required by the constitution, is to authenticate the bill, and that, being thus authenticated, it is to be presumed to have passed in accordance with the requirements of the constitution; that under the rule in *County of Ramsey v. Heenan*, *supra*, the presumption is not conclusive, but may be overthrown by a reference to the journals. There could be no such presumption, and no necessity of reference to the journals to overthrow it, if the

courts took judicial notice of the contents of the journals or of the course of bills in the two houses. The act in question, having been authenticated in the proper manner and approved by the governor, and the subject of it being within the constitutional power of the legislature, was, under the presumption stated in *State v. City of Hastings, supra*, *prima facie* a valid law, and the court it attempted to create, *prima facie* a legal court. It was therefore, within the principle we have stated, a court *de facto*.

Mitchell and Berry, JJ., dissented.

Application denied.

If the Judge is not Qualified.

HOAGLAND v. CREED, in Ill. Sup. Ct., 1876—81 Ill. 506.

SCHOFIELD, J. The record before us by this writ shows a trial, by agreement, before Edward P. Kirby, Esq., a member of the bar, and what purports to be a judgment rendered by him as judge of the circuit court of Morgan county. The bill of exceptions, or rather what purports to be the bill of exceptions, is signed by him; and it is impossible for us to close our eyes to the fact, however strongly we might be inclined to do so, that the record sought to be reviewed is one made by Edward P. Kirby, Esq., a member of the bar, and not by any one commissioned to act as circuit judge. What we might hold, did it appear that he was acting as circuit judge under color and claim of authority, we will not say—it is sufficient that all pretense that he was a judge *de facto* is without foundation in the record. It expressly shows that he is a member of the bar, and that his authority for assuming to act as judge was the agreement of the parties. Freeman on Judgments, § 148; *Case v. State*, 5 Ind. 1; *State v. Anone*, 2 Nott & McCord, (S. Car.) 27; *State v. Alling*, 12 Ohio 16; *Blackburn v. State*, 40 Tenn. (3 Head) 690; and *Pepin v. Lackenmeyer*, 45 N. Y. 27, cited by the counsel for the defendant in error, are, therefore, not in point.

Under our constitution, judges are elected by popular vote, except to fill vacancies not to exceed one year, which shall be filled by the appointment of the Governor. Const. 1870, art. 6, § 32. And all judges shall be commissioned by the Governor. Same article, § 29. And, unlike the constitutions of some other States, it contains no authority for temporarily filling the office in any other way.

With regard to the doctrine that consent can not confer jurisdiction as to the subject matter, and that judicial power can not be delegated, we deem it unnecessary to enter into any extended discussion. All that need be said on these subjects is [*508] so well said by Judge Cooley, in his work on Constitutional Limitations, 1st ed. p. 399, that we shall content ourselves with transcribing it: "But the courts of a country can not have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most, they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then, the judgment could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction, could make the decision binding upon him, either as a judgment or as an award. * * *

"If the parties can not confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purpose of the hearing."

That which, in the present record, purports to be a bill of exceptions and judgment is, therefore, a nullity, and there is no case before us upon which we are authorized to render final judgment. It follows, the writ of error must be dismissed.

Writ dismissed.

The Clerk being Absent during a part of the trial was held, as it seems to me properly, not even to make the judgment voidable on error and exception, the judge having designated another to perform the duties of the clerk in his absence. *Mealing v. Pace*, 14 Ga. 627.

The Place of Holding Court.

TENNY v. FILER, in N. Y. Sup. Ct., Jan., 1832—8 Wend. 569.

Filer sued Tenny in trespass for taking wheat on the ground. Plaintiff proved a justice judgment, execution thereon, and sale of the wheat to him on the execution. Defendant requested the court to charge the jury that the judgment relied on was void because the defendant therein was not served with summons and did not appear. Refusal to give the instruction is assigned as error. As the justice was crossing the street Brooks told him he might enter judgment *on that note*, and he did so accordingly.

By the Court, SAVAGE, CH. J. The appearance and confession of judgment by Brooks shewn in this case was not appearance [*570] and confession, within the meaning of the statute. By the act of 1824, § 12, a justice of the peace is authorized "to enter a judgment by confession of the defendant." The phraseology of the act of 1818 is in the same terms, and under that statute this court laid down the broad principle, "that a justice could not legally enter a judgment, unless the defendant appeared in person, or by attorney before him, *in court*, and confessed judgment, or had been duly summoned, as in ordinary cases." *Bromaghin v. Thorp*, 15 Johns. R. 476. If that decision be law, the court below erred. If there has been a loose practice as to the entry of judgments by justices on confession, as in the present case, it has been wrong, and the sooner it is corrected the better. The entry of the judgment was a nullity. The judgment of the common pleas must be reversed, and as the plaintiff cannot recover on the title he set up, there is no necessity for a *venire de novo*.

Judgment reversed.

WHITE v. RIGGS, in Me. Sup. Judicial Ct., May Term, 1847—27 Me. 114.

Appeal from a decree of the probate court of Lincoln county approving an instrument as the last will of B. Riggs, deceased.

SHEPLEY, J. It was said that the case found, that no public notice was given of the holding of a probate court at Georgetown, [*117] and that was not a place where probate courts were to be holden according to the provisions of the statute. The court could have no jurisdiction of the question there, and it is not

pretended that the will was approved at any other place. The decree is not in the usual form, and does not on its face show that the court was legally holden; and if it did, it was competent for the parties, as they have done, to agree upon the facts of the case, which show that the court had no jurisdiction. The acts of the defendant in appearing before the probate judge at Georgetown, and entering an appeal to this court, could not give the court jurisdiction.

As the supposed decree was void, because the probate court had no jurisdiction, the appeal must be dismissed.

Blackstone, adopting Coke's definition, says, "A court is a place where justice is judicially administered." 3 Com. 24.

"The prominence of the word *place* in this definition, no doubt, arises from the ancient idea that the king was the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times, and under our form of government, the judicial power is exercised by means of courts. A court is an instrumentality of government. It is a creation of the law, and, in some respects, it is an imaginary thing that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and persons by whom judicial functions are to be exercised, are essential to complete the idea of a court. It is in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptance of the term. But a court may exist in legal contemplation, without any officers charged with the duty of administering justice. The officers might all die or resign, and still the legal fiction would continue to exist." *Levy v. Bigelow*, 6 Ind. App. 677, 682. In this case it was held that the record sufficiently showed that a motion for a new trial was presented and denied by the trial court in term time, and therefore that the denial by the judge was the action of the court.

The Time of Holding Court.

GAMBLE v. BUFFALO COUNTY, in Neb. Sup. Ct., Dec. 8, 1898—57 Neb. 163, 77 N. W. 341.

IRVINE, C. This was an action on two official bonds of a former treasurer of Buffalo county. The principal did not answer. There was a trial of issues joined on the answer of the sureties and a judgment in form entered for the plaintiff. The sureties bring the case here for review.

It appears from the record, and is conceded in the briefs, that the supposed judgment was entered at a time when the district court was not in session; in other words, when it was the act of the judge in chambers and not of the court. The case being a simple action of a legal nature, and the judgment being for the recovery of money, and not of such a nature as the law

permits the judge to render in chambers, the attempted judgment [*164] was *coram non judice*, and void. *Hodgin v. Whitcomb*, 51 Neb. 617.

It is urged that the defendants consented to the entry of judgment in vacation. No such consent appears in the record. The entry which it is contended supports that assertion is the entry recording the trial and submission, and contains this: "Decision of this cause to be rendered in vacation." This indicates an order of the court rather than a stipulation of the parties. Moreover, had there been consent it would be immaterial. The defect is of jurisdiction of the subject-matter,—want of authority in the judge to make the order. Such authority cannot be supplied by consent.

Reversed and remanded.

HEMMENS v. BENTLEY, Mich. Sup. Ct., April 30, 1875—32 Mich. 89.

COOLEY, J. The defendant in error sued Hemmens to recover under the statute (*Comp. L., ch. 69*) for moneys paid to the latter by the husband of the former in the purchase of intoxicating [*90] drinks. The principal question in the case is, whether a previous suit between the same parties was not a bar to this. The circuit court held it to be no bar.

It seems to have been made out that the previous suit was for the same cause of action. It was brought before a justice of the peace, and was tried without a jury, February 21st, 1874. The justice states in his docket, that after hearing the proofs "thereupon the court took till the 23d day of February, 1874, at ten o'clock A. M., to render his decision at his office in Clinton. February 23d, 1874, ten o'clock A. M., cause called and parties appeared, and I, the said justice, do decide and determine that the above named plaintiff has no cause of action against said defendant, and judgment is hereby rendered in favor of said defendant and against the said plaintiff for the sum of forty-seven cents and costs of suit." This judgment the plaintiff treated as void, and proceeded to institute the present suit.

The decision must turn upon the statute of 1871 (*Comp. L., § 1559*) which provides that certain days, among them the twenty-second of February, "shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank notes and promissory notes, made after this act shall take effect, also for the holding of courts, be treated and considered

as is the first day of the week commonly called Sunday: *Provided*, That in case any of said holidays shall fall upon a Sunday, then the Monday following to be considered as the said holiday"—with other provisos not important here. In 1874, the 22d day of February fell upon Sunday.

It is contended on behalf of Hemmens that the mere rendition of a judgment by a justice in a case previously tried is not in contemplation of the statute the holding of a court, inasmuch as the parties are under no obligation to attend. Also that if the justice could not properly render judgment on the 23d, as he did, it was an irregularity merely, and not a void act, and advantage should have been taken [*91] of the error by an appeal or on *certiorari*. Whether either of these positions is tenable would seem, under the statute, to depend upon whether it might be sustained if the day had been Sunday, instead of a day which by the statute is to "be treated and considered as is" Sunday. The purpose to put them upon the same footing is clearly manifest in the statute. But had the day been Sunday, it cannot be doubted that the act of rendering a judgment would have been a void act. *Swann v. Broome*, Burr., 1595, is a direct authority on this point.—See also, *Fox v. Abel*, 2 Conn., 541; *Pearce v. Atwood*, 13 Mass., 324, 347; *Story v. Elliot*, 8 Cow., 28. It is clearly a judicial act, and it is necessary to hold a court in order to perform it. And being void, no one was under obligation to regard it. * * *

We find no error in the judgment, and it must be affirmed with costs. The other justices concurred.

SMURR v. STATE, in Ind. Sup. Ct. Jan. 26, 1886—105 Ind. 125, 4 N. E. 445.

ELLIOTT, J. On the twenty-second day of September, 1883, the Whitley circuit court, then being regularly in session, entered an order directing that an adjourned term be held, commencing on the twenty-ninth day of October, 1883, and notice was given of the adjourned term according to law. The time [*126] fixed in the order was a time when, under the provisions of the statute, the court in Kosciusko county might be in session; and Kosciusko county, in conjunction with Whitley county, constituted the thirty-third judicial court. The court in the former county was actually in session on the twenty-third day of October, 1883, and continued in session during the time the trial of the appellant was in progress; the judge of the thirty-third circuit having

appointed a special judge to hold that court. The adjourned term of the Whitley circuit court, at which the appellant was tried, was held by the duly-elected judge of that circuit. The appellant entered into trial without any objection, and made none until after verdict, and then, for the first time, presented the question of the authority of the judge of the thirty-third judicial circuit to hold the adjourned term. The statute fixes the time for holding the courts in the thirty-third circuit, and we know judicially that the September term, 1883, of the Whitley circuit court began on Monday, September 3d, and ended on the twenty-second day of that month. We know, also, that the September term of the Kosciusko circuit court began on the Monday following the close of the Whitley circuit court, and, as the term of the latter court began on the day named, Monday, September 24, 1883, it had been in session five weeks when the judge convened the adjourned term pursuant to the order previously made, and in accordance with the notice duly given. The statute provides that the length of the term of the Kosciusko circuit court shall be seven weeks, "if the business thereof requires it"; but there is no command that it shall continue for that length of time. The statute cannot be regarded as absolutely fixing the term at that period, for it declares that it shall continue for that length of time upon condition that the business shall require it.

The question whether the business requires that the full term of seven weeks shall be occupied is one to be decided by the judge, for it is not determined by any provision of the statute. [*127] *Casily v. State*, 32 Ind. 62; *Swails v. Coverdill*, 21 Ind. 271. As the decision of the question as to the length of time that the court shall sit is committed to the judge, his judgment must settle the question; and even if it be conceded that it is a decision that can be reversed on appeal, there must be an objection and an exception in order to present any question for review, for his decision can in no event be anything more than erroneous. This reasoning leads us to the conclusion that the judge was not bound to sit the full period of seven weeks in Kosciusko county, but might abridge the term by an adjournment. It was therefore within his power to shorten the term of that court, and if he exercised this authority directly by an order of adjournment, or indirectly by opening an adjourned term in another county of his circuit, it would seem to logically result that the adjourned term would be the one regularly held, and the term left to be held by the special judge be the one that was irregularly held. It is

difficult to perceive why the adjourned term, held pursuant to an order made in regular session, and held by the duly-qualified judge himself, should not be deemed the legal term; but we do not find it necessary to go to that extent in this case, for it is sufficient for our present purpose to declare that the judge of the thirty-third circuit had authority to abridge the term of the Kosciusko circuit court, and that, as he did have this authority, his act in appointing an adjourned term of the Whitley circuit court was not void. Where a court has general authority over a class of cases, or a general subject, a ruling or order made by it is not void, although it may be erroneous. As said in *Snelson v. State*, 16 Ind. 29: "But the power to decide at all carries with it the power to decide wrong as well as right." *Lantz v. Maffett*, 102 Ind. 23; *Quarl v. Abbett*, 102 Ind. 233, see p. 239, 1 N. E. 476. The authority to shorten the length of the term in Kosciusko [*128] county carried with it the authority to create a vacation by ending that term; and whether the court did or did not err in deciding that there should be a vacation in the Kosciusko circuit court on and after October 29th, or whether it did or did not make a mistake in the procedure adopted, is immaterial; for, no matter how much there is of error in the proceedings of a superior court, the proceedings are not void unless the court transcends its jurisdiction. We need not inquire what the rule would be if the statute had positively fixed the length of the terms of the Kosciusko circuit court at seven weeks, for the term was not definitely fixed, but its duration, within the limits prescribed, was left to be determined by the court itself. The utmost that can be granted the appellant is that the adjourned term was held under an order erroneously made. It cannot be declared that it was held without any authority whatever, and unless it was so held the proceedings were not void.

There is high authority for the proposition that, independent of a statutory warrant, courts of superior jurisdiction have authority to hold adjourned terms. *Mechanics' Bank v. Withers*, 6 Wheat. 107; *Harris v. Gest*, 4 Ohio St. 469; *Casily v. State*, 32 Ind. 62. We have, however, a statute authorizing courts to appoint adjourned terms, and a court assuming to act under that statute cannot be said to act without color of authority, although it may proceed erroneously. The only possible objection to the proceeding of the court in this instance is that it fixed the time for holding the adjourned term at a time when another court in the same circuit might have been in session; but as the term of the other court might have been abridged by the order of the

judge so that it would not have been in session at the time fixed for the adjourned term, and as the order for the adjourned term was made while the court was lawfully in session, and under a statute conferring authority to hold adjourned terms, the order for holding that term cannot be regarded as void. The utmost that can be justly said in impeachment of that order, and the acts done under it, is that they were erroneous, since the mistake, if mistake there was, consisted solely in wrongly deciding upon the force and effect of the statute.

We do not [*129] controvert the general doctrine that a court cannot be held at a time when there is clearly no authority to hold it, nor do we impugn the general doctrine that it is error to hold two courts in the same circuit at the same time, where there is no statutory provision authorizing it. *Cain v. Goda*, 84 Ind. 209; *Batten v. State*, 80 Ind. 394; *McCool v. State*, 7 Ind. 378; *Dunn v. State*, 2 Ark. 229; *In re Millington*, 24 Kan. 214; *Garlick v. Dunn*, 42 Ala. 404; Freem. Judgm. § 121. It is not necessary to question the soundness of the general doctrine stated, for here there was power in the court to create a vacation by an order, and there was also power to order an adjourned term; so that here there is no question as to the existence of power in the court to make a decision, but the sole infirmity in the proceedings relates to the mode of exercising the power residing in the court. In every case in which a court makes erroneous ruling, there is a wrongful exercise of authority; but such a wrongful exercise of authority does not render the proceedings void, although it does make them erroneous. The question of power or authority might, perhaps, have arisen had the adjourned term been fixed at a time when the law imperatively required that the Kosciusko circuit should be in session; but its adjourned term was not fixed at a time when that court was required to be in session. On the contrary, it was fixed at a time when the judge might rightfully have adjourned that court. This feature is a prominent one, and distinguishes the case from such cases as that of *In re Millington*, 24 Kan. 214. If the judge had made the proper order declaring the Kosciusko circuit adjourned after five weeks of the term had expired, as he undoubtedly might have done, there could have been no question as to the regularity of the adjourned court held by him in Whitley county, and the error in this respect, while it might, perhaps, have been available had objection been seasonably made, cannot be deemed to render the order for the [*130] adjourned term void; and, if that order was not void, the trial at that term was not a mere nullity. *Casily*

v. *State*, 32 Ind. 62; *Knight v. State*, 70 Ind. 375; *Labadie v. Dean*, 47 Tex. 90; *State v. Clark*, 30 Iowa 168; *Cook v. Smith*, 54 Iowa, 636, 6 N. W. 259, and 7 N. W. 16.

Principle and authority logically lead to the conclusion that nothing worse can be said of the adjourned term than that it was irregularly held. It cannot be justly affirmed that it was held without color of authority. In the case of *State v. Knight*, 19 Iowa, 94, it was held that a judge might continue a term of court into the time fixed by law for holding a court in the same district, and the earlier cases of *Davis v. Fish*, 1 G. Greene, 406; S. C. 48 Amer. Dec. 387, see note p. 392; and *Grable v. State*, 2 G. Greene, 559,—were in effect overruled. It was held by the same court in *Weaver v. Cooledge*, 15 Iowa, 244, that a judgment rendered three days after the time fixed for the commencement of another court in the same district was not void; and in *State v. Clark*, *supra*, and *Cook v. Smith*, *supra*, like rulings were made. In the very recent cases of *State v. Stevens*, 67 Iowa 557, 25 N. W. 777, and *State v. Peterson*, 67 Iowa 564, it was held that a judgment pronounced at a term continued after the time fixed for another term of the same district was not even erroneous. The supreme court of Wisconsin, in *State v. Leahy*, 1 Wis. 225, denied the doctrine of the two early Iowa cases, as well as that of *Archer v. Ross*, 2 Scam. 303, and decided that holding a court during the time designated by law for holding another court in the same judicial circuit did not invalidate the proceedings. In the case of *State v. Montgomery*, 8 Kan. 351, a like doctrine was declared. In this last case it was said: "The legislature have named the day for the opening of a term, but have not for the closing. That is confined to the discretion of the judge, and is determined by the amount of business, and the necessity of suitors." This is the case here,—the time was fixed for opening, but not for closing, the Kosciusko circuit [*131] court. That, as we have seen, was left to the judgment of the judge.

Brewer v. State, 6 Lea, 198, decides that although a judge *pro tempore* appoints an adjourned term, and orders it to be held at a time when another court of the same circuit might be in session, the proceedings are not void. The court placed its decision upon the same principle as that which sustains the rulings of a judge *de facto*, and said, among other things: "Nor does the fact that the term of another court of the circuit commenced in the interval affect the result. This very point arose, and was decided in favor of the validity of the proceedings, in *Cheek v. Merchants' Bank*, 9 Heisk. 489."

In *Venable v. White*, 2 Head, 582, it was held that where no objection is made, and there is color of authority for holding the term, that, although the statute under which the judge assumed to act had been repealed, still, the proceedings were not void. It was there said: "There can be no doubt whatever, upon reason and authority, that a judgment given by a judge *de facto*, sitting and holding court at a proper time and place, is valid and free from error as a judgment pronounced by a judge rightfully in office. If so, upon what reason shall we hold that the judgments and decrees of a judge rightfully in office are erroneous because he held his court under color of a law that turned out to be repealed or invalid?" In *Henslie v. State*, 3 Heisk. 202, the same general principle is declared.

The cases, and among them our own, declare that where an adjourned term is held under color of authority, it will be presumed that it was properly ordered and held. *Porter v. State*, 2 Ind. 435; *Shirts v. Irons*, 28 Ind. 458; *Harper v. State*, 42 Ind. 405; *Cook v. Skelton*, 20 Ill. 107; *State v. Clark*, 30 Iowa 168; *Cook v. Smith*, 54 Iowa 636, 6 N. W. 259, 7 N. W. 16. This principle justifies the conclusion that where there is color of authority the proceedings cannot be deemed void, since it is an elementary rule that no presumption can sustain a void act.

The principle which governs in cases in which the court is [*132] held by a judge *de facto* is essentially the same as that which governs the present. If a judge not legally elected or qualified may, if acting under color of authority, pronounce valid judgments, it cannot be doubted that, upon the same principle, judgments pronounced at a term not legally held, but yet held by a duly-qualified judge under color of law, must be valid. The reason for the rule is stronger and clearer where the judge *de jure* holds a term of court at an improper time, but under color of authority, than where a term of court is held by a judge who actually has no legal right, and simply acts under color of authority. Yet the law is quite well settled that the acts of a judge, who is only such *de facto*, are not void. We have many cases in our own reports declaring and enforcing this general rule. * * *

There is some confusion, and perhaps conflict, in the earlier cases; but the later cases, supported as they are by all the well-considered cases in our reports, must be regarded as firmly settling the rule that where a judge assumes to act under lawful authority, and there is color of authority, his acts [*134] will not be void, and that if the party voluntarily goes to trial without objection, an objection after conviction will be too late to be of

avail. This is in harmony with the great weight of authority elsewhere. *Bank of North America v. McCall*, 4 Bin. 371; *State v. County Court*, 50 Mo. 317; *Clark v. Com.*, 29 Pa. St. 138; *Com. v. Hawkes*, 123 Mass. 525; *Com. v. Taber*, Id. 253; *Sheehan's Case*, 122 Mass. 445; *State v. Anone*, 2 Nott & McC. 27; *State v. Alling*, 12 Ohio, 16; *Masterson v. Matthews*, 60 Ala. 260; *Mayo v. Stoneum*, 2 Ala. 390; *State v. Carroll*, 38 Conn. 449.

The ultimate conclusion which we have reached is this: Where a judge, having statutory authority to appoint an adjourned term of court, does make an order in term-time for holding an adjourned term, causes notice of such adjourned term to be given, appears at the time appointed and opens court, the proceedings at such an adjourned court are not void, although held at a time when another court of the same circuit might have been in session under the statute, and was in session, presided over by a special judge. As the proceedings were not void, the failure of the appellant to object at the trial was a waiver of all questions as to the regularity of the proceedings at the adjourned term. If he had made an objection before conviction, we should have been faced by a very different question from that which the record presents. It is not necessary for us to decide—nor, indeed, would it be proper for us to do so—what would be the rule if an objection were made, before trial, to proceeding at an adjourned term held under such circumstances as that at which the appellant was convicted.

The conclusion which we have reached does the appellant no substantial injury, for he was tried by the rightful judge, and was denied no right for which he asked. The utmost that can be said is that the adjourned term was irregularly held by the proper judge, and, as the appellant lost no substantial rights by the alleged error of the judge, and made no [*135] objection until after trial, we cannot, under the rule declared by our statute and enforced by our decisions, reverse the judgment. * * *

Judgment affirmed.

In granting a prohibition against further proceeding on a new trial granted by the regular judge on motion set for hearing at a special term at which the hearing was adjourned by a specially elected judge till the regular judge could attend, the court said: "It is not the meeting of the judge and officers of a court at the county-seat that constitutes a court, but that meeting must be at a time authorized by law. *Brumley v. State*, 20 Ark. 77; *Ex parte Osborn*, 24 Ark. 479. The terms of the circuit court are prescribed by statute. It is provided, however, that 'special adjourned sessions of any court may be held in continuation of the regular term, upon its being so ordered by the court or judge in term time, and entered by the clerk on the record.' Mansf. Dig. §§ 1476, 1481. There is no such thing known to our laws as two circuit courts held at the same cir-

cuit at the same time, one presided over by the regular judge and the other by a special judge. Suitors are entitled to have their causes tried before the circuit judge, unless he is disqualified or unable to preside from causes beyond his control. It was lawful for the Desha circuit court to adjourn its sittings to a distant day; but when that day arrived, and he was detained by his judicial duties in another county of his circuit, the adjourned session necessarily failed; for there was no power to supply his place temporarily, by a special election by the attorneys in attendance—his absence for this cause not being such an inability to continue to hold the court as is contemplated by § 21, Art. 7, Constitution of 1874." *State ex rel. Butler v. Williams* (1887), 48 Ark. 227, 2 S. W. 843.

Effect of Order in Recess During Term. In refusing to dismiss an appeal on the ground that the order appealed from was made in vacation, and therefore void, the court stated that six of the seven judges composing the court below had signed an order Oct. 3, adjourning the term over to Nov. 1, and the order appealed from was made Oct. 4 by the judge who had not joined in the order of adjournment. The court said: "There is a marked distinction between an adjournment *sine die* of a term of court and those intermissions which inevitably occur during a term. A court has the inherent power during the term to suspend business, as occasion may require, from one hour or one day to another. In this respect there is no difference between an adjournment from one day to the next and adjournment to a more distant day. In either case the term continues; and while, during the intermission, the functions of the court are for some purposes suspended, still the court remains in existence, and it is still term time. The judges do not by such an order lose all power of control over the sessions, and may revoke the order of adjournment and reconvene before the time first fixed. *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168; *Wharton v. Sims*, 88 Ga. 618, 15 S. E. 771; *Cole Co. v. Dallmeyer*, 101 Mo. 57, 13 S. W. 687." *Green v. Morse*, 57 Neb. 391, 77 N. W. 925, 73 Am. St. Rep. 518.

Power to Hear and Determine Causes of the Kind in Question.

ARROYO DITCH AND WATER CO. v. SUPERIOR COURT, in Cal.
Sup. Ct., Nov. 23, 1901—92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91.

HARRISON, J. The plaintiff, a private corporation, brought an action against one E. J. Standlee, in the justice's court for Downey township, in Los Angeles county, upon a promissory note for twenty-one dollars, executed to it by him. The defendant filed a verified answer to the complaint, alleging that the sole consideration for which the note had been given was a pretended assessment by the plaintiff upon its capital stock (of which he held a certain number of shares), and that the said assessment was illegal and void. Upon filing the answer, the defendant moved the court to transfer the action to the superior court, upon the ground that it necessarily involved the question of the legality of an assessment, and thereupon the court suspended all further proceedings in the action, and certified the pleadings to the county

clerk of Los Angeles county. After the pleadings had been filed with the county clerk, the plaintiff moved the superior court to remand the cause to the justice's court upon the ground that that court erred in transferring the cause to the superior court, and that the superior court had no jurisdiction of the matter. This motion was denied, and the court thereafter tried the cause, and rendered a judgment in favor of the defendant. At the instance of the plaintiff, a writ of review was issued out of this court to the superior court, and in obedience thereto a transcript of the records and proceedings of that court in the matter has been certified to this court.

[*50] The constitution, article VI, section 5, declares that "the superior court shall have original jurisdiction * * * in all cases at law which involve the * * * legality of any tax, impost, assessment, toll, or municipal fine." The term "assessment," used in this provision, does not include the installments or "calls," which are sometimes termed assessments, made under the provisions of section 331 of the Civil Code, by a private corporation upon its stockholders in accordance with an agreement on their part, express or implied, to pay into its treasury the amount subscribed by them to its capital stock. It has reference to such assessments as are authorized by those provisions of the constitution which relate to revenue and taxation, and to such as may be made under the authority of a municipal or other public corporation for the purpose of meeting the cost or expense of some public improvement. (*Taylor v. Palmer*, 31 Cal. 241.) The other words in the clause, in connection with which the term is associated, serve to illustrate its meaning, and resolve any doubt that might otherwise be raised respecting the sense in which it is to be interpreted. Each of these subjects, viz., tax, impost, toll, municipal fine, of which jurisdiction is thus conferred upon the superior court, implies a charge imposed by public authority for some public purpose, and under the rules by which the maxim, *noscitur a sociis*, is applied, it is clear that the "assessment" referred to is of a kindred nature. Inasmuch, therefore, as the constitution has not conferred upon the superior court any original jurisdiction to determine the legality of the assessment alleged in the answer of the defendant, it follows that the justice's court had full jurisdiction to determine all questions relating to such assessment that might be presented upon the trial of the cause, and had no authority to certify the pleadings to the superior court.

The proposition of the respondent, that the determination of this question by the justice was conclusive, cannot be main-

tained. While a justice of the peace has jurisdiction to pass upon any question of fact or of [*51] law which is involved in the trial of an issue properly before him, so that his judgment in the cause will be binding upon the parties in the absence of any appeal or review, yet he has not the jurisdiction in this summary mode to divest himself of jurisdiction, or to transfer a cause which is within his jurisdiction to a tribunal which has no jurisdiction to determine it. If in the present case he had tried the cause, and rendered judgment therein for the defendant upon the ground that the justice's court had no jurisdiction to determine the subject-matter presented by the defense, or to try the cause, an appeal could have been taken from that judgment to the superior court, and the superior court would then have had the power, under its appellate jurisdiction, to pass definitively upon the question. He could not, however, determine the question in advance of trying the cause, and give to such determination the effect of a judgment.

Nor did the superior court acquire jurisdiction of the cause by the fact that the justice had certified the pleadings to the county clerk. The constitution has given to it original and appellate jurisdiction, but it can exercise its original jurisdiction only in those cases provided by the constitution and its appellate jurisdiction only in such cases as may be prescribed by law. It cannot exercise original jurisdiction in those matters in which its jurisdiction is only appellate. The jurisdiction that it exercises under the provisions of section 838 of the Code of Civil Procedure is original, and not appellate, and the provision in that section, that "from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the *same* jurisdiction as if it had been commenced therein," implies that if it would have had no jurisdiction over the action if it had commenced therein, it can have no jurisdiction by the filing of the pleadings certified by the justice.

Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its own records of its action in any matter [*52] that it had not acquired jurisdiction either of the subject-matter or of the parties, this presumption is destroyed. It cannot exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in the mode prescribed by statute. Merely certifying to the county clerk by a justice of the peace the pleadings in a case pending before him does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not

been conferred upon it by the constitution. Nor does it acquire jurisdiction of the parties to that cause by thereafter determining that it has jurisdiction, and by proceeding in the trial of the cause, and rendering judgment therein. The fact that a party, after his objection to the jurisdiction of a court has been overruled, proceeds under such objection to try the cause does not preclude him from thereafter questioning the power of the court to take any steps in the matter. *Lyman v. Milton*, 44 Cal. 630; *Harkness v. Hyde*, 98 U. S. 479.

If the court never acquired jurisdiction over him, it does not acquire it because he may have chanced to be in the courtroom when the case was called for trial, and while protesting against the trial, endeavors to protect his rights against the claims of his adversary. "The jurisdiction of the [superior] court under section 838 was special, and that court could hear and determine the cause only after the pleadings before the justice were filed with its clerk. The [superior] court had jurisdiction only because the pleadings had before the justice and filed with its clerk presented the issue of the legality or validity of the tax or impost, and could then take jurisdiction only for the purpose of trying the issue as to the legality of the tax or impost; since, the amount being less than three hundred dollars, the justice's court had jurisdiction to pass upon every other issue." *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 147.

Inasmuch as the only mode in which it is claimed that the superior court acquired any jurisdiction of the action brought by the plaintiff against Standlee was from the act of the justice of the peace in certifying the pleadings [*53] therein to the county clerk, and as we have seen that such act was unauthorized, it follows that the action was never legally before the superior court for determination, and that it was without any jurisdiction to render a judgment in the case.

It is therefore ordered that the judgment of the superior court, and all orders and proceedings by it taken in the case, be and they are hereby annulled.

SHARPSTEIN, GAROUTTE, DEHAVEN, PATERSON, MCFARLAND, JJ., and BEATTY, C.J., concurred.

Power to Render a Judgment Like the One in Question.

HUNT v. HUNT, in N. Y. Ct. of App., Jan. 28, 1878—72 N. Y. 217,
28 Am. Rep. 129.

FOLGER, J. This is a suit in equity, brought by the plaintiff against the defendant, for a divorce *a vinculo matrimonii*. She alleges that she is now his wife. She bases her right to a dissolution of the marriage on an allegation of adultery committed by him. That the plaintiff and defendant were once married is admitted. It is also conceded, that since the marriage the defendant has formed a matrimonial alliance in fact, with another woman than the plaintiff. * * * [*225] The justification set up by him in this suit is, that prior to the commencement of it, and prior to that matrimonial alliance in fact, he had obtained a judgment against the plaintiff of a dissolution of the relation of marriage once existing between them, whereby he was set at liberty to marry again. * * * It is claimed by the plaintiff that that judgment was got [*226] by fraud upon her and upon the court, and that it is void for want of jurisdiction in the court which assumed to render it, in that the court had neither jurisdiction of the subject-matter nor of the party defendant.

We do not think that the allegation of fraud is maintained. * * * [227] * * * We come now to consider the question of the jurisdiction of the court. * * * [228] * * * Power given by law to a court, to adjudge divorces from the ties of matrimony, does give jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony, in an application for divorce, should show that a state of facts does not exist which makes a legal cause for [229] divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter; that it has not power to entertain the proceeding, to hear the proofs and allegations, and to determine upon their sufficiency and legal effect. * * * Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case as in a criminal case,—as, for instance, in a civil action for false and fraudulent

representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning of the phrase [230] "subject matter," in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. * * * [231] * * * The court which rendered this judgment had lawful jurisdiction of the subject-matter of divorce. The plaintiff, however, makes the point against the validity of the judgment that it was void in Louisiana, as wholly unauthorized by, and in conflict with, the constitution of the state. And here it is, that is of import to know what is meant by the term "jurisdiction of the subject-matter." If it means no more than power to act when, and not till when, a state of facts is proven which exactly squares with the grounds for divorce prescribed and established by constitutional and valid statutes, then we must inquire what the constitution of a state permits in the way of statutory regulation, and whether the proofs in any case show that the court which in that case adjudged a divorce had sufficient evidence before it to enable it to give judgment. In effect, we must review the judgment upon the law and the facts. If the term means what we have above pointed out that it does mean, then we are to give credit to the judgment of a court which, having power to act upon the general subject of divorce, has heard the cause, and has proceeded to judgment. * * * [Here the court discussed the sufficiency of substituted service to obtain jurisdiction of the person in divorce proceedings, and held the service good.] * * * [245] * * *

It, therefore, appears that as the judgment of divorce, set up by the defendant, was rendered by a court having jurisdiction of the subject-matter, and of the persons of the plaintiff and defendant, * * * it affords to the defendant a complete defense to this suit. * * *

Judgment affirmed.

WILKINS v. STILES, in Vt. Sup. Ct., Aug. 21, 1902—75 Vt. 42, 52
Atl. 1048, 98 Am. St. Rep. 804.

PETITION FOR WRIT OF PROHIBITION. Heard on pleadings and testimony at the October Term, 1901, of this court, sitting for the County of Chittenden.

MUNSON, J. The relator seeks to prohibit further proceedings in an action wherein judgment was rendered against him by Albert Worcester, a justice of the peace. He concedes that if Justice Worcester had jurisdiction over the claim or matter in suit at the time this judgment was rendered, his petition will not lie. But he claims that the jurisdiction which Justice Worcester would otherwise have had was taken away by proceedings previously had before David Frechette, another [*44] justice of the peace. His claim, more specifically stated, is that the matter of the suit had been fully settled in the case decided by Justice Frechette; that the plaintiffs split their claim in bringing these suits; and that this was done to deprive the county court of its appellate jurisdiction.

Both actions were suits in trover for the conversion of the same two mileage books. The minute made by Justice Frechette upon the writ, after noting appearances, was as follows: "As the evidence in the case did not show to what degree the defendant damaged the plaintiff, and no malicious intent from the defendant, therefore the court adjudged that the case be dismissed, and that the defendant recover his costs." The relator insisted in the suit before Justice Worcester that the judgment in the first suit was a bar to that action, and plaintiffs' counsel then produced the record of that judgment as finally made up by Justice Frechette. This showed that the defendant moved "that the plaintiffs become non-suited and the case be dismissed because the plaintiffs had not put in sufficient evidence as to the distance which the defendant was entitled to go upon said mileage whereby the court could assess damages," and that after hearing the arguments upon this motion the justice found that the evidence did not show to what degree the defendant damaged the plaintiffs, and that plaintiffs should therefore become non-suited and the case be dismissed and the defendant recover his costs. Justice Worcester held upon inspection of this record that the prior judgment did not bar the proceedings before him, and rendered judgment for the plaintiffs.

The judgment rendered by Justice Frechette, although called in his record a judgment of non-suit, is shown by that record to have been in fact a judgment upon the merits, and Justice Worcester erred in holding the contrary. It appeared from the record that evidence in support of the plaintiffs' claim [*45] was introduced, and that the justice considered it, and gave judgment for the defendant because of its inadequacy. A justice judgment rendered upon such proceedings is necessarily a judgment on the merits, whatever its form, and upon whatever motion it is given. *Smith v. Crane*, 12 Vt. 487.

This brings us to the question whether Justice Worcester exceeded his jurisdiction in giving judgment for the plaintiffs in disregard of this prior adjudication. The case was certainly within his jurisdiction in the sense in which the subject is treated in *Perry v. Morse*, 57 Vt. 509; that is, he had jurisdiction of claims in trover to the required amount, and of the process before him, and of the parties named in it. It was also within his jurisdiction to construe the record of the former judgment when offered in evidence, and give it effect in reaching his decision. But he was led by a misconstruction of this record to give judgment upon a matter that had been previously adjudicated, and it is claimed that in rendering the judgment he acted without jurisdiction.

The general rule is that when a court has jurisdiction of the subject matter and the parties, the writ of prohibition is not available for the correction of its erroneous decisions. But when the erroneous decision is one which operates as an unlawful assumption of jurisdiction, prohibition may be had, as appears from *Bullard v. Thorpe*, 66 Vt. 599, 30 Atl. 36, 25 L. R. A. 605, 44 Am. St. Rep. 867. So the question for decision is whether the error of law committed by Justice Worcester carried him beyond his jurisdiction.

In delivering the opinion in *Bullard v. Thorpe*, Judge Taft reviewed the decisions of different jurisdictions, many of which may seem from the brief statements there made to support the relator's contention, and some of which undoubtedly do support it. But near the close of the opinion, Judge Taft reminds the reader that this review was largely by way of illustration, [*46] and that the case must not be taken as authority for anything beyond the exact point decided.

The general rule above stated is distinctly recognized in *Bullard v. Thorpe*, and one of the cases cited in that connection

is *Toft v. Rayner*, 5 M. G. & S., 162, which is exactly in point here. The defendant was summoned before the county court in Cambridgeshire in an action for goods sold and delivered, and it appeared that the plaintiff had already recovered judgment against him in an action for the same debt in the borough court of Cambridge, and that his goods had been seized and sold upon that judgment. The plaintiff recovered notwithstanding this, and the defendant sought to prohibit further proceedings, on the ground that, the matter being *res judicata*, the county court had no jurisdiction. The relator's counsel was asked how it could be said that the county court had no jurisdiction, and replied exactly in the line of the present argument, that it had jurisdiction of the matter at first, but that that jurisdiction ceased when the former judgment was shown. But the court said that the ground of the application was neither more nor less than that the county court, in deciding what it was competent for it to decide, made a mistake in point of law; and the writ was thereupon denied.

It is certain that the matter now complained of was not jurisdictional. The decision was not one by which the justice took unlawful cognizance of the subject matter or the parties. His jurisdiction of both was complete, and continued notwithstanding the record of the former suit. The production of that record merely raised a question incidental to the trial of his case. His erroneous decision of that question to the injury of the relator was a misfortune to which all suitors are liable in cases where no appeal is allowed to a higher court. The extension of the remedy of prohibition to such cases would lead to a review by this court of all unappealable cases where ignorance [*47] of our decisions had led to the rendition of improper judgments.

This case is clearly distinguishable from *Bullard v. Thorpe*. There was in each case an erroneous disposition of a matter which the court had authority to determine; in one a disregard of the doctrine of *res judicata*, in the other a refusal to recognize the entirety of the claim. But the first was a decision which had no jurisdictional consequences; while the second gave the justice a final jurisdiction to which he was not entitled. The legislature has denied litigants the remedy of appeal when the matter in demand does not exceed twenty dollars, but has given them the remedy when the matter in demand exceeds that amount; and they cannot be deprived of this right by splitting an entire claim into sums below the statutory limit. The writ of prohibition was held available to prevent this—not because the decision was erroneous,

but because the court thereby assumed an exclusive jurisdiction to which it was not entitled. The decision now complained of was equally erroneous, but it worked no infringement of jurisdictional limits.

It is not necessary to examine the evidence upon which it is claimed in argument that this case presents a splitting of the claim that affected the final jurisdiction. The petition does not in terms allege, nor set forth facts which indicate, that there was a splitting of the claim, and that matter cannot be treated as in issue.

Petition dismissed with costs.

JURISDICTION DEPENDING ON THE PROCEEDINGS IN THE CAUSE.

What Brings the Parties Within the Court's Power.

DOUGLAS et al. v. FORREST, Exr., in Court of Common Pleas of England, Easter Term, 1824—4 Bingham (13 E. C. L.) 686.

BEST, C. J. This was an action brought by the assignees of Stein & Co., bankrupts, against the executor of the will of John Hunter.

[*698] On the 31st day of May, 1799, the testator acknowledged himself to be indebted to Stein & Co. in the sum of 447*l.* 6*s.* 3*d.*; and on the 11th of June, in the same year, he acknowledged that he owed 75*l.* to Robert Smith, one of the bankrupts, and one of the firm of Stein & Co. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a heritable property. Shortly after the year 1799, the deceased went to India. He died in India in 1817, having never revisited Scotland.

On the 25th of February, 1802, two decrees were pronounced in the court of session in Scotland against the deceased, one at the instance of Stein & Co., and the other at the instance of Robert Smith. In the first of these the deceased was ordered to pay to Stein & Co. 447*l.* 6*s.* 3*d.*, with interest, from the — day of —, besides expenses of process, &c. In the second decree the deceased was ordered to pay Robert Smith the sum of 75*l.*, with interest, from the — of —, besides expenses of process, &c. It appeared, from these decrees, that the deceased was out of Scot-

land at the time the proceedings were instituted in these causes. He never had any notice of these proceedings. The decrees stated, that the deceased had been (according to the law of Scotland) summoned at the market-cross of Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved, that, by the law of Scotland, the court of session might pronounce judgment against a native Scotchman who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved, that a person against whom such a decree was pronounced, might, at any time within forty years, dispute the merits of such decree; but that after the [*699] expiration of forty years, it was conclusive against him, and all who claimed under him.

By a decree of the court of session, of the date of the 5th of July, 1804, that court adjudged that certain property which the deceased possessed in Scotland should belong to Robert Smith and his heirs, in *payment* and *satisfaction* of the sum of 75*l.*, with interest from the 11th of June, 1799. By another decree of the same date, the court of session adjudged, that certain other property of the deceased in Scotland should belong to Stein & Co., and their heirs, in *payment* and *satisfaction* of the sum of 447*l.* 6*s.* 3*d.*, with interest from the 11th of June, 1799. The last two decrees fill up the blanks left in the first decrees, by giving the time from which interest was to be paid on the debts, namely, from the 11th of June, 1799; and if the plaintiffs can maintain their action, entitles them to a verdict for the sum of 862*l.* The terms in which the last two decrees are expressed, seem to import that the lands adjudged to Stein & Co., and Smith, were given to and accepted by them in satisfaction of these debts; but this cannot be the true construction of these decrees, because none of the decrees are conclusive against the deceased and those who claim under him, until the expiration of forty years from the time of pronouncing the first two decrees. The advocate who was examined in the cause proved, that by the law of Scotland, these decrees would not operate as satisfaction of the debts, during the period that the debtor had a right to dispute the validity of the first judgments. A Scotch statute, which we have looked into, shows the accuracy of the opinion given to us on the Scotch laws by the learned advocate: and I feel it due to him to say, that, from the manner in which he gave his evidence, the clearness and precision with which

he explained the grounds of his opinion, I have no doubt that he is extremely well acquainted with the [*700] Scotch law, and that we may safely rely on every part of his evidence.

The last two decrees, proving that interest was to run from 1799, and the testimony of the learned advocate, who proved, that when decrees adjudged that interest should be paid, but did not show the time from which it was to run, interest was payable from the time of the citation—disposes of the objection that no interest could be recovered upon these decrees.

The plaintiffs rested their claim on these decrees. The defendant insisted that these decrees would not support an action in our courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from Scotland, and without any notice given to him that any proceedings were instituted against him. This defence was made on the general issue. The defendant also pleaded, that the plaintiffs' cause of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time when the cause of action accrued, was beyond seas, and remained beyond the seas until the year 1817, when he died; and that the plaintiffs sued out their writ against the defendant, within six years after he first took on himself the burthen and execution of the will of the deceased in Great Britain, and that he had no other executor in Great Britain. This replication was fully proved, and, therefore, the issue taken on it was properly found for the plaintiffs.

The questions to be decided are, first, whether an action can be maintained in England on these judgments of the court of session in Scotland. Secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the defendant's counsel, that if these decrees are repugnant to the [*701] principles of universal justice, this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts. If a debt be contracted within the city of London, and the creditor issues a summons against the debtor, to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or

money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is for ever deprived of his property or the debts due to him.

In such cases the defendant may be in the East Indies whilst the proceedings are going on against him in a court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice De Grey thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in London, and in other towns in England, and in many of our colonies from their first establishment. Lord Chief Justice De Grey and the court of common pleas, after much consideration, decided against the validity of the attachment, according to the report¹ in 3 Wilson, 297, because the party objecting to it had *never been summoned or had notice*. The report of the same case in 2 Blackstone, 834, shows that the court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a *summons with a return of nihil*; that is, such a [*702] summons as I have mentioned, namely, one that shows that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The 54 G. 3, c. 137, not only recognizes the practice on which these decrees are founded, as being according to the law of Scotland, but enacts, that on notices being given at the *market-cross* at Edinburgh, and on the *pier* and shore of Leith, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases, is contrary to the principles of justice? A natural born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged, under his hand, that he owed the debts: he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of Scotland has

¹*Fisher v. Lane*, 2 Wm. Blackst. 834, 3 Wils. 297.

only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts.

The reasoning of Lord Ellenborough, in the case of *Buchanan v. Rucker*, 1 Campb. 63, and 9 East, 192, is in favor of these decrees. Speaking of a case decided by Lord Kenyon, his lordship says, in that case the defendant had property in the [*703] island, and might be considered as *virtually present*. The court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of *Cavan v. Stewart*, 1 Starkie 525, Lord Ellenborough says, you must prove him summoned, or, *at least*, that he was once in the island of Jamaica, when the attachment issued. To be sure, if attachments issued against persons who never were within the jurisdiction of the court issuing them, could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it. The only other case that has been mentioned is that of *Williams v. Lord Bagot*, 3 B. & C. 772; in that case a summons to appear, and an attachment to compel appearance, issued at the same time, and were returnable at the same time. These proceedings were not only contrary to justice, but contrary to our law, and the court from which these proceedings issued was governed by English law. * * *

Judgment for plaintiffs.

PENNOYER v. NEFF, in U. S. Sup. Ct., 1877—95 U. S. (5 Otto) 714.

Action in the United States circuit court for the district of Oregon by Neff against Pennoyer to recover land in Multnomah county, Oregon. From a judgment for Neff, on a special verdict found by the court on a trial without a jury, pursuant to written and filed stipulation, Pennoyer brings error. Affirmed.

FIELD, J. This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the state of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27, 1850, usually known as the Donation law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the state. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the state; [*720] that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, "unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it was established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum et al.*, 11 How. 165. In the case against the plaintiff the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the

court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit by which the publication was proved.

[*721] There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type,—he does not usually have a foreman or clerks,—it is rather used as synonymous with publisher. The supreme court of New York so held in one case; observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." *Bunce v. Reed*, 16 Barb. (N. Y.) 347. And, following this rule, the supreme court of California held that an affidavit made by a "publisher and proprietor" was sufficient. *Sharp v. Daugney*, 33 Cal. 505. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state

court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand [*722] of a resident creditor except by a proceeding *in rem*; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the circuit court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding [*723] such persons or property in any other tribunals." Story, *Conf. Laws*, § 539.

But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give extra-territorial operation to its laws, or to enforce an extra-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property it situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Masie v. Watts*, 6 Cranch. 148; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464.

So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident [*724] have no property in the state, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Piquet v. Swan*, 5 Mason 35, Fed. Cas. No. 11,134, Mr. Justice Story said:—

“Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pro-

nounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice*."

And in *Boswell's Lessee v. Otis*, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said:—

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

These citations are not made as authoritative expositions of the law; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper v. Reynolds*, 77 U. S. (10 Wallace) 308, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served [*725] with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. * * * [*726] * * * [Here the court states the facts and quotes at length from the opinion in *Cooper v. Reynolds*. See *Post* 113.]

The fact that the defendants in that case had fled from the state, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of its authority over persons and property

thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court; but to the doctrine declared in the above citation he agreed, and he may add, that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other states. If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon [*727] which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties that the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and

process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and [*728] the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In *Webster v. Reid*, 11 Howard 437, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:—

“These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property

has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

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The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States, and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provision of the constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject-matter. *M'Elmoyle v. Cohen*, 13 Pet. 312. In the case of *D'Arcy v. Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the circuit court of the United States for Louisiana, brought upon a judgment rendered in New York under a state statute, against two joint debtors, only one of whom had been served with the process, the other being a non-resident of the state. The circuit court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments by any state of the union, so

far [*730] as known; and that the state courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the states in 1790, was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another." *The Lafayette Insurance Co. v. French et al.*, 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of *Thompson v. Whitman*, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the state and federal courts, where attempts have been made under the act of Congress to give effect in one state to personal judgments rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interests in property, within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily [*731] appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one state have no jurisdiction over persons beyond its limits, and can enquire only

into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In *Bissell v. Briggs*, 9 Mass. 462, decided by the supreme court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned, and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one state has goods, effects, and credits in another, his creditor living in the other state may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the state of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the state of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the state the court had jurisdiction by the attachment, but none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.

In *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that [*732] the attachment bound only the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice DeGrey, used in the case of *Fisher v. Lane*, 3 Wils. 297, in 1772. See also *Borden v. Fitch*, 15 Johns. (N. Y.) 121, and the cases there cited, and *Harris v. Hardeman et al.*, 14 How. 334. To the same purport decisions are found in all the state courts. In several of the cases, the decision has

been accompanied with the observation that a personal judgment thus recovered has no binding force without the state in which it is rendered, implying that in such state it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the state. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered. *Smith v. McCutcheon*, 38 Mo. 415; *Darrance v. Preston*, 18 Iowa, 396; *Hakes v. Shupe*, 27 id. 465; *Mitchell's Administrator v. Gray*, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any rights are claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals [*733] of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.

Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings accord-

ing to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.

Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against [*734] him in the state, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement

of a new action. *Nations et al. v. Johnson et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the state court of Oregon against the plaintiff herein, then a non-resident of the state, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a state may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute [*735] right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., § 156.

Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the court of exchequer in *Vallee v. Dumergue*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification

has been followed, even though he may not have actual notice of them." See also *The Lafayette Insurance Co. v. French et al.*, 18 How. 404, and *Gillespie v. Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.) 201. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their [*736] interest subject to the conditions prescribed by law. *Copin v. Adamson*, Law Rep. 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

HUNT, J., *dissenting*. I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it. * * *

The judgment of this court is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. It, therefore, affects all like cases, past and future, and in every state. * * * [*737]

The result of the authorities on the subject, and the sound conclusions to be drawn from the principles which should govern the decision, as I shall endeavor to show, are these:—

1. A sovereign state must necessarily have such control over the real and personal property actually being within its limits, as that it may subject the same to the payment of debts justly due to its citizens.

2. This result is not altered by the circumstance that the owner of the property is non-resident, and so absent from the state that legal process cannot be served upon him personally.

3. Personal notice of a proceeding by which title to property is passed is not indispensable; it is competent to the state to authorize substituted service by publication or otherwise, as the

commencement of a suit against non-residents, the judgment in which will authorize the sale of property in such state.

4. It belongs to the legislative power of the state to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.

5. Whether the property of such non-resident shall be seized [*738] upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a matter not of constitutional power, but of municipal regulation only.

To say that a sovereign state has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustained. * * *

ST. CLAIR v. COX, in U. S. Sup. Ct., Dec. 18, 1882—106 U. S. 350, 1 Sup. Ct. Rep. 354.

Action in the circuit court of the United States for the Eastern District of Michigan, on two notes for \$2,500 each. The defense was failure of consideration. On the trial defendants offered in evidence a certified copy of the record of a judgment recovered by them in the circuit court for Marquette county, Mich., against the Winthrop Mining Co., an Illinois corporation, the payee of the notes. This evidence was excluded and judgment given for the plaintiff for the amount claimed. The defendants bring the case here by writ of error, and the exclusion of the record of the judgment is the only error assigned.

FIELD, J. * * * The judgment of the circuit court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents

of the state, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence [*352] that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for \$6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent, and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sects. 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this state against any corporation

created by or under the laws of any other state, [*353] government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this state, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sects. 6544 and 6550.

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer v. Neff* [ante 41] we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary [*354] of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be

sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen v. Middleton Manufacturing Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another state he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham v. North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its [*355] officer to reside in the state and transact business there on its account. *Libbey v. Hodgdon*, 9 N. H. 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222.

This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter

into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

[*356] The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.

A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co. v. French*, "These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or

inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; *Paul v. Virginia*, 8 Wall. 168.

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this [*357] court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views.

The state of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the state. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the state, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that state is made to serve a double purpose,—as a command to the officer

to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. The decision in *Newell v. Great Western Railway Co.*, 19 Mich. 336, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by [*358] removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the state. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the state, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the state at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the state, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this state an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring

that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, *the then official, the officer then in a manner impersonating the company, should be served.* Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this state." p. 344.

According to the view thus expressed by the Supreme Court [*359] of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the state. This representation implies that the corporation does business, or has business, in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former state, the Supreme Court of New Jersey said, that a law of another state which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law, that the courts of other states ought not to sanction it." *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere

in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular [*360] transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, as far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

ST. MARY'S FRANCO-AMERICAN PETROLEUM CO. v. WEST VIRGINIA, in U. S. Sup. Ct., Dec. 3, 1906—203 U. S. 183,
51 L. ed. 144, 27 S. Ct. Rep. 132.

Writ of error to review a judgment of the Supreme Court of Appeals of West Virginia awarding a peremptory writ of mandamus commanding the St. Mary's F. A. P. Co. to appoint the state auditor general its attorney in fact, to accept service of process and notice on it, according to W. Va. Code c. 54, § 24, and Acts of 1905 c. 39, providing that such auditor shall be such attorney for every foreign corporation and every non-resident domestic corporation and receive for the state \$10 from the corporation for each process served on him for it. The St. Mary's F. A. P. Co. is a corporation organized under the laws of W. Va.,

and having its office and chief works out of the state at Lima, Ohio.

FULLER, C. J. It is argued that the act of February 22, 1905, is invalid under the Fourteenth Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But in view of repeated decisions of this court, the contention is without merit. The state had the clear right to regulate its own creations, and, *a fortiori*, foreign corporations permitted to transact business within its borders.

In this instance it put all non-resident domestic corporations, which elected to have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect of the service of process, and the law operated on all these alike.

Such a classification was reasonable and not open to constitutional objection. *Orient Insurance Company v. Daggs*, 172 U. S. 557, 563; *Waters-Pierce Oil Company v. Texas*, 177 U. S. 43; *Central Loan and Trust Company v. Campbell*, 173 U. S. 84; *National Council v. State Council*, 203 U. S. 151; *Northwestern Life Insurance Company v. Riggs*, 203 U. S. 243; Brannon on Fourteenth Amendment, Chap. 16.

It is true that the prior law left it to the corporation to appoint an attorney to represent it, and that the act of February, 1905, changed this so as to make the auditor such attorney, but this at the most was no more than an amendment as to the appointment of an agent, and when the St. Mary's Company accepted its charter it did so subject to the right of amendment. And we agree with the state court that the [*192] requirement of the payment of ten dollars to the auditor for the use of the state does not amount to a taking of property without due process or an unjust discrimination. *Charlotte Railroad v. Gibbs*, 142 U. S. 386; *People v. Squire*, 145 U. S. 175. If the act is valid, that is.

The objections going to the expediency or the hardships and injustice of the act, and its alleged inconsistency with the state constitution and laws, are matters with which we have nothing to do on this writ of error, and the question whether the provision that the corporation shall not be required to pay any fee to any one theretofore appointed an attorney is invalid or not, requires no consideration on this record.

Judgment affirmed.

What Questions the Pleadings Enable the Court to Decide.

SACHE v. WALLACE, in Minn. Sup. Ct., May 31, 1907—101 Minn. 169,
112 N. W. 386, 118 Am. St. Rep. 612.

Action by Wm. R. Sache against Ellen M. Gillette and Emma L. Wallace. Judgment for plaintiff, and he appeals from an order modifying it.

BROWN, J. This action was brought under Revised Laws of 1905, section 4424, to determine adverse claims to certain real property. The complaint, so far as here material, alleges that the plaintiff is the owner in fee simple of the land, which is described therein; that it is vacant and unoccupied; and that defendant claims some title or interest therein adverse to plaintiff. "Wherefore the plaintiff prays that he may be adjudged to be the owner in fee simple of the above described real estate, * * * and that the defendant may be adjudged to have no right, title, interest or estate in said real estate, * * * and that he may have such other and further relief," etc. The summons was duly served, but defendant made no appearance in the action. Thereafter, on application of plaintiff, the court below made an order reciting the service of the summons and default of defendant and directing the entry of judgment "in all things in accordance with the prayer of the complaint." There were no findings of fact disclosing the source of plaintiff's title to the property, or the title or right of defendant, nor any finding upon which to predicate a judgment transferring to plaintiff defendant's title, if any she had. The order for judgment was in the form often used in default cases, and does not disclose that any evidence was offered for the consideration of the court. On June 27, 1905, judgment was duly entered by the clerk, substantially as prayed for in the complaint, to the effect that plaintiff was the owner of the property and that defendant had no title or right therein, and for the following further relief not prayed for in the complaint, nor embraced within the scope of the order for judgment, namely: "It is further adjudged and decreed that all the right, title, interest, estate or lien in, to, upon, or against said premises, held, owned, or possessed by said Ellen M. Gillette [defendant], be and it is hereby transferred to and vested in William R. Sache, the plaintiff in this action."

Defendant was in fact neither owner of the property at the

time of the commencement of the action nor had she any interest therein when judgment was entered, having prior thereto conveyed the same to Emma L. Wallace; but the deed had not then been recorded. On October 31, 1906, more than a year after the entry of the judgment, [*171] Mrs. Wallace, upon affidavits setting forth her ownership of the property and her ignorance of the action or judgment, moved the court to strike from the judgment the provision quoted above in full, by which the title of defendant was transferred to and vested in plaintiff, on the ground, among others, that the court had no authority to incorporate the same in the judgment, in that the relief thereby granted was not prayed for in the complaint. The court granted the motion, and plaintiff appealed.

It is contended by appellant that, conceding for the purposes of the point that the relief granted exceeded that to which plaintiff was entitled under the complaint, the inclusion thereof in the judgment was an error or irregularity not going to the jurisdiction of the court, to be corrected by motion or appeal within the time prescribed by statute for the correction of such errors; that the judgment, not having been so proceeded against, became, after the time for appeal had expired, final and conclusive as to all the world. The merits of this contention depend wholly upon the question whether the embodiment of the excessive relief in the judgment was a mere irregularity, or whether it exceeded the jurisdiction and power of the court. If a mere irregularity, counsel's contention is sound. It is elementary that a judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached, either directly or indirectly, for mere errors or irregularities not going to the jurisdiction of the court; but in all cases where the court exceeds its jurisdiction, and want of jurisdiction appears upon the face of the record, the judgment may be attacked at any time, before or after the time for appeal, even by a person not a party to the action, but who is affected thereby in his property rights: *Muel-ler v. Reimer*, 46 Minn. 314, 48 N. W. 1120; 12 Ency. of Pl. & Pr. 188; *Phelps v. Heaton*, 79 Minn. 476, 82 N. W. 990.

1. The courts are not in full harmony as to what constitutes an irregularity within the meaning of the rule referred to. Generally speaking, however, an irregularity may be defined as a failure to follow appropriate and necessary rules of practice or procedure, omitting some act essential to the due and orderly conduct of the action or proceeding, or doing it in an improper manner: 17 Am. & Eng. Ency. of Law, 2d ed., 481; *Jenness v.*

Circuit Judge, 42 Mich. 469, 4 N. W. 220; *Holmes v. Russel*, 9 Dowl. 487. Errors or defects of this character, [172] that may be amended without prejudice to the absolute rights of the parties, do not affect the jurisdiction of the court to the extent that its final action is a nullity, but proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject matter of the action or proceedings, or not, utterly void: *Ex parte Simmons*, 62 Ala. 416; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *Barton v. Saunders*, 16 Or. 51, 8 Am. St. Rep. 261, 16 Pac. 921.

The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of "jurisdiction of the subject matter," then it may commit all sorts of depredations upon the rights of parties, particularly in default cases. "Jurisdiction of the subject matter" means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide. Though it has general jurisdiction over the subject matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between the parties in a given action is limited to those questions which are brought before it by the pleadings. The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls and the rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard. When the court goes beyond and outside the issues made by the pleadings, and in the absence of one of the parties determines property rights against him which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity. This position is sustained both from the view point of our statutes upon the subject and under the rules and principles of the common law.

2. The action was one to determine adverse claims to real

property. [173] The complaint alleges title in plaintiff, and that defendant claims to have some estate or interest therein adverse to plaintiff. The prayer for relief was that plaintiff be decreed the owner of the property, and that defendant be adjudged to have no interest in or title to the same. The court ordered judgment for the relief demanded in the complaint. Plaintiff caused judgment to be entered for the other and further relief now objected to.

Our statutes (Rev. Laws 1905, sec. 4264) provide: That "as against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint. Against all others, he may have any relief consistent with the complaint and within the issue actually tried." This plain and explicit language ought, it would seem, to relieve from serious doubt the question whether a judgment entered in violation of its terms is void for want of jurisdiction. The command of the statute is unqualified, and its purpose is obvious. The object of the statute was to prevent "snap judgments" against defendants, who, upon examination of the complaint in an action against them, are content that the plaintiff may have the relief therein demanded, and for that reason do not appear or answer. Defendants so situated may rely upon the statute for their protection, and are not required to follow the action or the proceedings therein, for the purpose of ascertaining whether a judgment other than that demanded has been entered against them. A judgment in violation of the statute cannot, therefore, be a mere irregularity to be cured by amendment, but the exercise of power expressly withheld from the court, and consequently beyond its jurisdiction.

Although every exercise of power not possessed by a court will not necessarily render its action a nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. This is fundamental, and must be applied to this case, unless we are to adopt a new rule, not contemplated by the lawmakers, which will compel all litigants to be vigilant in preventing an unlawful invasion of their rights. A construction of the statute which would require this of the defendant in a case of this character, or sustain a judgment for greater relief than that demanded, on the theory that the excessive relief was a mere irregularity, would emasculate the statute and render [174] it inoperative and of no practical value. We do not so construe it, but, on the contrary, hold that a violation of

its command is extrajudicial and void. Of course, an instance might arise, in the case of an imperfectly framed prayer for relief, where a judgment beyond its scope might be sustained, if within the allegations of the complaint. But such is not this case. The prayer of the complaint here before us is complete, and asks for all the relief the allegations of the complaint justify.

A number of authorities are cited by counsel for the plaintiff which apparently sustain his view of this question. But we are not inclined to follow them. They are at variance, as seems to us, with sound logic, reason, and the weight of authority. In Wisconsin, for instance, it has been held that a judgment sentencing a person to a longer term of imprisonment than the statute warrants is an irregularity, to be corrected by appeal, and not void for want of jurisdiction: *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148. The contrary doctrine is upheld by the supreme court of the United States: *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118, and cases there cited. The Wisconsin rule is followed in South Dakota, but by a divided court. Under a statute similar to our own, two of the three judges of the supreme court of that state held that a judgment in a default case which granted relief beyond that demanded in the complaint was not void, but merely erroneous or irregular: *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698, 90 N. W. 1042, 58 L. R. A. 811. In Indiana, in actions for the recovery of money, a judgment for an excessive amount is held erroneous but not void; while in other forms of actions, as will be presently shown, judgments granting relief in excess of that demanded by the pleadings are held by that court void for want of jurisdiction: *Gum E. R. Co. v. Mexico R. Co.*, 140 Ind. 158, 39 N. E. 443, 3 L. R. A. 700; *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161. The distinction between the two classes of judgments is found in the fact that the miscalculation of interest, or other mistakes in reference to the amount of recovery, are clerical in their nature, and should be corrected by motion or appeal. A clear departure from the relief demanded in equitable actions materially differs from an excessive judgment in actions for money only.

3. But the weight of authority sustains the proposition that at common [175] law the judgment is void for want of jurisdiction. In fact, it may be said our statute created no new rule on the subject, but merely adopted that existing at common law. It is laid down in 1 Black on Judgments, 242, as a general principle, that, in addition to jurisdiction of the parties and subject

matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. Support for this doctrine is found in numerous well-considered cases.

In *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161, a complaint in replevin tendered no issue except the right of possession, yet judgment was entered determining the title to the property as between the parties. It was contended in an action upon the replevin bond that, the court having had jurisdiction of the parties and the subject matter of the replevin action, the judgment therein was conclusive against collateral attack. The court held the judgment void, in so far as it attempted to adjudicate upon the question of title to the property, for the reason that that question was not involved under the pleadings. The court said: "Neither reason nor authority lends any support to the view that, because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested, whether it be involved in the pending litigation or not"; citing *Munday v. Vail*, 34 N. J. L. 418; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Bigelow on Estoppel*, 92. The decision in that case was followed in *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51, and in *Unfried v. Heberer*, 63 Ind. 67. The last case was cited with approval by Mr. Justice Brewer in *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464.

A judgment for relief beyond the issues was held unauthorized, and "not within the power of the court," in *Boogher v. Frazier*, 99 Mo. 325, 12 S. W. 885. Such is the law in the state of Illinois: *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. In *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132, the Ohio supreme court held that a judgment on a subject of litigation within the jurisdiction of the court, but not brought before it by any statement or claim of the parties, is null and void, and [176] may be collaterally impeached; citing *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706. To the same effect, *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 622, 2 S. E. 36. It was said in *Sandoval v. Rosser*, 86 Tex. 682, 26 S. W. 933, "that a court has no more power, until its action is called into exercise by some sort of pleading, to render a judgment in favor of a party than it has to enter a

judgment against him." And the judgment there involved, granting relief beyond the pleadings, was held open to collateral attack: *Dunlap v. Southerlin*, 63 Tex. 38; 1 Black on Judgments, 241.

The case of *Ritchie v. Sayers* (C. C.), 100 Fed. 520, involved a collateral attack on a judgment, and the court after referring to the rule as generally stated in the books, namely, that the judgment of a court having jurisdiction of the parties and the subject matter of the action is conclusive and cannot be collaterally called into question, said: "That may be conceded. But the question is, Did it have jurisdiction to enter the particular decree and judgment thereon that it did enter? As we have before seen, we reach the conclusion that the particular judgment could not be entered; and it is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and particular judgment, then that decree and judgment may be collaterally impeached"; citing *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118; *Ex parte Cuddy*, 131 U. S. 280, 9 Sup. Ct. Rep. 703, 33 L. ed. 154; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36.

The two cases in 131 U. S. are directly opposed to the doctrine of the Wisconsin supreme court laid down in *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148, as already pointed out. In the Nielsen case (131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118), the supreme court of the United States declared such a judgment wholly void, and the person there under sentence of imprisonment not authorized by law was released upon habeas corpus. In the Cuddy case (131 U. S. 280, 9 Sup. Ct. Rep. 703, 33 L. ed. 154), the same court held that the fact that a judgment was excessive and unauthorized might be shown in habeas corpus, though the excess did not appear on the face of the record. It was held in *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603, that, to render a judgment within the jurisdiction of the court, not only jurisdiction [177] over the parties and the subject matter must appear, but it must also appear that the matter acted upon by the court was before it under the pleadings, and the judgment there involved, as to matters not presented in the pleadings, was held void on indirect attack. Such is the law in Kansas (*Watkins L. M. Co. v. Mullen*, 8 Kan. App. 705, 54 Pac. 921), where

the court approves the rule as laid down in 12 American and English Encyclopedia of Law, second edition, 246, to the effect that a judgment of a court having jurisdiction of the case, but not jurisdiction to enter the particular judgment, may be collaterally impeached, citing *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927, *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118, and other cases herein referred to. That jurisdiction of the question the court assumes to decide, as well as of the parties and the subject matter of the action, is essential to the validity of a judgment is laid down as a general rule in 23 Cyc. 684.

The tendency of the courts to enlarge the definition of "jurisdiction," by many text-writers and judges seemingly limited to authority over the subject matter and parties is referred to in *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379, with the statement that it should, properly defined, include, not only power to hear and determine, "but power to render the particular judgment in the particular case." The court in that case sustained a collateral attack upon a judgment offered as evidence on the ground that it was void on its face, for the reason that the relief therein granted exceeded the issues made by the pleadings; citing 1 Black on Judgments, secs. 215, 242; *Johnson v. Johnson*, 20 Colo. 143, 36 Pac. 898; *Munday v. Vail*, 34 N. J. L. 418. In the case last cited a decree in equity granted relief beyond that prayed for in the complaint, and the court, on collateral attack, held it invalid. It is a leading case on this subject, and is quoted from in *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464. In disposing of the question the New Jersey court said: "A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these [178] particular interests which they choose to draw in question that a power of judicial decision arises."

The doctrine of the cases cited has been applied in this state. In *State v. Miesen*, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513, a judgment imposing a punishment in contempt proceedings not authorized by law was collaterally assailed and held

void in habeas corpus proceedings: *In re White*, 43 Minn. 250, 45 N. W. 232. See, also, *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218, 12 Ency. of Pl. & Pr. 131, and cases there cited. In view of this array of judicial opinion, we have no difficulty in reaching the conclusion that the judgment in question, in so far as it attempts to transfer to plaintiff the title held by defendant, is *coram non judice*, and void.

4. But it is further contended by plaintiff that this particular feature of the judgment came within the scope of the complaint and the action, and that the relief was therefore properly granted. This contention is untenable. The statute providing for this form of action to determine rights in real property was not designed as a means for acquiring title, but, on the contrary, was intended as an expeditious mode of quieting and extinguishing claims of title held adversely to plaintiff: *Camp v. Smith*, 2 Minn. 131 (155). A judgment in such an action, based upon the usual form of complaint, does not of itself operate to transfer title from defendant to plaintiff: *Minn. Debenture Co. v. Johnson*, 94 Minn. 150, 110 Am. St. Rep. 354, 102 N. W. 381. The reason for this is found in the fact, like the old ejectment action, that there is nothing of record to disclose or reveal the title that was in fact adjudicated. And though an ordinary judgment in such an action might be made a link in the chain of title, by evidence *dehors* the record connecting plaintiff with the title adjudicated (Sedgwick & Wait on Title to Land, sec. 523), yet, standing alone, the judgment is evidence only of the fact that the rights of the defendant have been extinguished.

But, conceding that a transfer of title may be effected in this form of action under proper pleadings, it is clear that such was not the purpose of this action. The complaint was not framed upon such a theory. It simply alleged that defendant claimed some title or interest in the land adverse to plaintiff, and judgment was demanded that she be adjudged to have no title.

[179] The case in this respect is analogous to *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218; 12 Ency. of Pl. & Pr. 131. There, in an action to foreclose a mortgage, the complaint alleged that one of the defendants claimed some lien upon or interest in the mortgaged premises, the basis of which was unknown to plaintiff, but that it was subordinate and junior to plaintiff's mortgage. Judgment was demanded that defendant set up his claim or be forever barred from asserting it. The defendant did not answer, and default

judgment was taken against him, in which it was adjudged that he had no right, title or interest in the property whatsoever. In a subsequent action by defendant to foreclose a mortgage upon the property held by him, and existing at the time of the pendency of the former action, it was insisted that his rights under the mortgage were barred by the former judgment, for it was there determined that he had no interest in the property. The court held that the judgment went beyond the issues made by the complaint in the former suit, and was void. The case is parallel to that at bar and in line with the authorities heretofore cited. As pertinent to this feature of the case, see *Alexander v. Thompson*, 101 Minn. 5, 111 N. W. 385. The complaint in the case before us did not seek a transfer of title, and section 4391 of Revised Laws of 1905 has no application. That statute can have no reference to other than actions in which it is necessary to pass title in order to carry the judgment of the court into effect.

This disposes of all the questions necessary to be considered, and results in an affirmance of the order appealed from. It is probable, under the authorities cited, that the judgment could have been as successfully assailed in other proceedings, when offered in evidence in support of plaintiff's title to the land; but the right to correct it in this manner is clear.

Order affirmed.

What Brings the Property or Things Within the Court's Power.

LINDLEY v. O'REILLY, in N. J. Ct. of Errors & App., Aug. 9, 1888—
50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79.

Ejectment by Catherine O'Reilly against David Lindley for land in Atlantic county. From judgment in favor of plaintiff, defendant brings error. Reversed.

DEPUE, J. Patrick O'Reilly died in 1881. In his lifetime he was seized of a tract of land in the county of Atlantic, in this state, the subject of controversy in this suit. By his will, dated December 5th, 1877, proved before the surrogate of Atlantic county July 5th, 1881, and letters testamentary granted thereon, he devised his entire estate to the plaintiff, his wife, for life. Exception was taken to the admission of a certified copy of this will, but the printed case does not contain a full copy of the

will, nor does any assignment of error touch the competency of this evidence. It must be assumed that this will was duly executed to devise lands under the laws of this state, and that the same was duly probated to make a certified copy competent evidence. On this presentation of title, the plaintiff would have been entitled to a verdict.

The obstacle in the way of the plaintiff's recovering, in virtue of her title under her husband's will, arose from a deed made by O'Reilly and wife to one Henry Francis Felix, on the 14th of January, 1861. This deed purported to be an absolute conveyance, in fee simple, for the consideration of \$18,000. To sustain title under her husband's will, it was necessary for the plaintiff to overcome or extinguish the legal title thus conveyed.

The plaintiff contended, at the trial, that the deed to Felix was, in fact, a mortgage, and that the debt or liability for which it was given was paid and satisfied, and that on the discharge of the obligation for which the conveyance was made, the estate of the mortgagee was extinguished. In a trial at [*639] law it is not competent to show, by oral testimony, that an absolute deed was, in reality, a mortgage. In our judicial system, the jurisdiction to convert an absolute deed into a mortgage, by parol evidence, is exclusively in the equity courts. The competency and effect of the evidence produced by the plaintiff for this purpose, are the issues raised by the bill of exceptions and assignments of error.

Felix died in 1866. By his will he gave all his property for the benefit of his wife, Alicia Kate, and a charitable society known as the Sisters of the Immaculate Heart of Mary, and made the Right Reverend James F. Wood, Roman Catholic Bishop of Philadelphia, executor.

Felix, at the time of his death, resided at Reading, in the county of Berks, Pennsylvania. On the 4th of December, 1867, O'Reilly filed a bill of equity in the court of common pleas of the county of Berks, against the Right Reverend James F. Wood, executor of the last will and testament of Henry F. Felix, Alicia Kate Felix, widow of said Henry F. Felix, and the religious order of the Sisters of the Immaculate Heart of Mary.

The bill set out, that the Right Reverend James F. Wood was a resident of Philadelphia, that Alicia Kate Felix resided in Reading, and that the religious order of the Sisters of the Immaculate Heart of Mary was a society established in Reading. It charged that the deed of conveyance made by O'Reilly to Felix was, in legal effect, a mortgage; that the same was made

as security to indemnify Felix against his liability on certain promissory notes made by O'Reilly and endorsed by Felix, and discounted by the Farmers' Bank of Reading, and under protest, and that, subsequently, the said notes were fully paid and satisfied by the said O'Reilly; that the said Felix sustained no loss or damage in consequence of the said endorsements, and prayed a reconveyance of the legal title. The defendants named in the bill appeared and filed an answer. By consent of parties an examiner was appointed January 27th, 1868, who filed his report November 1st, 1869, and in September, 1880, the case was brought on for hearing, by consent, [*640] on the bill, answer and report of the examiner; and on the 20th of September, 1880, a decree was signed, in which, after reciting that the court being satisfied that the allegations of the plaintiff's bill were correct and true, and that all the notes endorsed by Felix, and liabilities incurred by him for O'Reilly, had been, by O'Reilly, fully paid, discharged and satisfied, it was ordered and decreed that the Right Reverend James F. Wood, executor of the last will and testament of deceased, should execute and deliver to Patrick O'Reilly, a deed of reconveyance of the premises in fee simple.

All the parties to the suit resided in Pennsylvania. The Pennsylvania court had jurisdiction of the parties and also of the subject-matter of the suit. The contested problem is the effect of its decree upon the title to lands in this state. If the decree can affect the title to lands in this state, it extinguished the Felix title without a reconveyance, for in this state a mortgage is regarded as a mere security for the debt or liability for which it is given, and payment or satisfaction of the debt or liability discharges the mortgage, and reverts the mortgaged premises in the mortgagor without a reconveyance. *Shields v. Lozeau*, 5 Vroom 496; *Kloepping v. Stellmacher*, 7 Id. 176; *Jackson v. Terrell*, 10 Id. 329; *Schalk v. Kingsley*, 13 Id. 32.

Ever since *Penn v. Lord Baltimore*, 1 Ves. Sr., 444, it has been established law that in cases of contract, trust, or fraud, the equity courts of one state or country, having jurisdiction of the parties, are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. The principle upon which this jurisdiction rests is, that chancery, acting *in personam* and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction that arises when a special equity can be shown which forms a ground for compelling a party to

convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief [*641] decreed can be obtained through the party's personal obedience. If it went beyond that the assumption would not only be presumptuous but ineffectual. Westlake on International Law, 57, 58. The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title. The cases on this subject are numerous. They are collected in the note to *Penn v. Lord Baltimore*, 2 Lead. Cas. in Eq. 1806, (1047). Brett's Lead. Cas. in Eq. 254; *Ewing v. Orr Ewing*, 9 App. Cas. 34; *Norris v. Chambres*, 29 Beav. 246; *Massie v. Watts*, 6 Cranch 148; *Wood v. Warner*, 2 McCarthy (D. C.) 81; *Vaughan v. Barkley*, 6 Wharton (Pa.) 392. In *Davis v. Headley*, 7 C. E. Gr. 115, the complainant obtained a decree in the circuit court of Kentucky against Headley, that a conveyance of lands in New Jersey, made by the complainant, should be rescinded and set aside, the possession restored and the defendant enjoined from setting up the conveyance. He then filed a bill in the court of chancery of this state to enforce the decree. The jurisdiction of the parties and of the subject-matter of that suit was undisputed. The bill to enforce the decree was nevertheless dismissed. Chancellor Zabriskie, in dismissing the bill, declared that it was a well settled principle of law in the decisions of England and of this country, and acquiesced in by the jurists of all civilized nations, that immovable property is exclusively subject to the laws and jurisdiction of the courts of the state or nation in which it is located, and that no other laws or courts could affect it. He added, "I find no case in which a statute, judgment or proceeding in one country has been held to affect such property in another country or beyond the jurisdiction of the sovereign or court making the statute or decree." After referring to *Penn v. Lord Baltimore*, and the cases in which decrees for specific performance of contracts relating to lands without their jurisdiction were made, the learned chancellor said: "But in these cases it is admitted, as it was by Lord Hardwicke, that these [*642] decrees could not affect the land, but could only be enforced where the court had jurisdiction of the person of the defendant and thus compel him to execute the conveyance. *In such cases it is the conveyance and not the decree that has the effect.*"

A similar precedent in the federal courts enforced the same

view. *Watts v. Waddle et al.*, 1 McLean 200; s. c. on appeal, 6 Peters 389. Lands situate in Ohio were covered by two patents, one issued to Powell and the other to Watts. To remove this cloud upon his title, Watts commenced suit against Powell's heirs in the circuit court for the district of Kentucky, and obtained a decree sustaining his title. The court had jurisdiction of the parties. By the decree the defendants were required to convey the premises to the complainant. A statute of Kentucky authorized the court, in case the defendant in such a suit failed to convey, to appoint a commissioner to make conveyance. By the decree a commissioner was appointed, and, no conveyance having been made by the parties, a deed was executed by the commissioner. A suit afterwards brought in the federal circuit court of Ohio, brought in question the effect of the decree of the Kentucky court, and of the commissioner's deed in execution of it, upon the title to the lands. The court held that neither the decree nor the commissioner's deed vested the legal title in the complainant. In the opinion in the supreme court, Mr. Justice McLean said: "The most decisive objection to the decree against Powell's heirs is, that it does not vest the legal title in Watts. A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt."

These cases rest upon the rule, which is firmly established, that the courts of one state or country are without jurisdiction over title to lands in another state or country. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, is subordinate to this rule, and applies to [*643] the records and proceedings of the courts only so far as they have jurisdiction. *Public Works v. Columbia College*, 17 Wall. 521; *Watts v. Waddle*, 6 Peters 389; *Brine v. Ins. Co.*, 96 U. S. 627, 635; *Davis v. Headley*, 7 C. E. Gr. 115, 121; *Nelson v. Potter*, 50 N. J. L. 324.

The Pennsylvania court having no jurisdiction over title to lands in this state, its decree, though conclusive within the jurisdiction which pronounced it, cannot be allowed to affect the title to these lands. It could not, therefore, operate to convert the deed to Felix into a mortgage, and then decree it a satisfied encumbrance. For this reason, as well as another which will be presently stated, the decree did not extinguish the Felix title.

The plaintiff also offered in evidence a deed made by Wood

to Patrick O'Reilly, dated October 16th, 1869, whereby the premises in suit were reconveyed to O'Reilly. This deed was made pending the equity suit, after the evidence in that suit was taken, and before the final decree. It sets out the substance of O'Reilly's bill, as to the nature and purpose of his deed to Felix, and the payment and discharge by O'Reilly of the debt or liability to secure which the deed was given, and recites that the grantor is satisfied that the allegations in the bill are true, and in formal words it reconveys the premises to O'Reilly in fee. * * * [*650] * * *

To complete the chain of title from Felix it was necessary for the plaintiff to show title in Wood, and this could be done only by proof of the Felix will. A copy of this will, certified by the register of probate of the county of Berks, authenticated in the manner prescribed by the act of Congress, was filed and recorded in the office of the surrogate of Atlantic county, April [*651] 11th, 1882, and a transcript of that record, certified by the surrogate, was produced and received in evidence as proof of the will. * * * [*652] * * * It did not in any way appear before the surrogate that the will had been admitted to probate [*653] in Pennsylvania, except by the affidavit of an attorney-at-law practicing in that state, that the said will had been duly proved and admitted to probate, as well as recorded in the office of the register of wills of Berks county. This affidavit was not competent to establish that fact.

The probate of a will is a judicial act, to be proven by a sworn or duly certified copy of the record, or at least by the certificate of the officer before whom the probate is made. And where the object of making such a will a record in this state is for the purpose of making title to lands, the record exemplified from another state must contain the proofs taken upon the probate, that it may appear by such proof that the will was made and executed in the manner and with the formalities prescribed by the statute of this state for devises of lands. Without such proofs, the record, however authenticated, is not even *prima facie* evidence of title to lands. *Allaire v. Allaire*, 8 Vroom 312; s. c. Id. 113; *Nelson v. Potter*, 50, N. J. L. 324.

The court erred in admitting the transcript of the will in evidence, and in directing a verdict for the plaintiff. For these reasons the judgment should be

Reversed.

HARRIS v. BALK, in U. S. Sup. Ct., May 8, 1905—198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. Rep. 625.

Action commenced by Balk against Harris in justice court in North Carolina to recover \$180. Both parties resided where the suit was brought. Harris pleaded in bar, that, while in Baltimore, Md., he had been summoned as garnishee in a suit against Balk, in which Balk had been served by publication according to the law of Maryland, in which he had answered admitting said indebtedness of \$180 to Balk, and by consent of Harris's counsel judgment had been rendered against him for said amount, which he had paid to the attorney for the creditor in the attachment suit. The trial court rendered judgment for the plaintiff, which was affirmed by the state supreme court (130 N. Car. 381, 41 S. E. 940), on the ground that the Maryland court had no jurisdiction of the debt due Balk. Harris brings the case here by writ of error.

PECKHAM, J. The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the federal question is whether it did not thereby refuse the full faith and credit to such judgment which is required by the federal constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the state of Maryland, and personally served with process therein, was a non-resident of that state, only casually or temporarily within its boundaries; that the situs of the debt due from Harris, the garnishee, to the defendant in error herein, was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the state of Maryland, had not possession of any property of Balk, and the Maryland state court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that state provide for an attachment of this nature if the debtor, the garnishee, is found in the state, and the court obtains jurisdiction over him by the

service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the state court obtains no jurisdiction over the garnishee if he be but temporarily within the state [*222] proceed upon the theory that the situs of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. *Blackstone v. Miller*, 188 U. S. 189-206, 47 L. ed. 439-445, 23 Sup. Ct. Rep. 277. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as [*223] much bound to pay his debt in a

foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the *situs* is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon the debt itself. *Cahoon v. Morgan*, 38 Vt. 236; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. The law of Maryland provides for the attachments of credits in a [*224] case like this. See §§ 8 and 10 of article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods, and credits of the debtor. Section 10 particularly provides that "any kind of property or *credits* belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12, and 13 of the above-mentioned article provide the general

practice for levying the attachment, and the proceedings subsequent thereto. Where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Buschman v. Hanna*, 72 Md. 1, 5, 6, 18 Atl. 962. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the state where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the state, then the judgment entered is a valid judgment. See Minor on Conflict of Laws, § 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the state is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan v. Neville*, 74 Pa. 52, by the [*225] supreme court in Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.*, 127 Mo. 242, 247, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; in *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; and in *Harvey v. Great Northern R. Co.*, 50 Minn. 405, 406, 407, 17 L. R. A. 84, 52 N. W. 905; and to the same effect is *Embree v. Hanna*, 5 Johns. 101; also *Savin v. Bond*, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the supreme court of the district had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938 (*Douglass v. Phenix*

Ins. Co.), is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the state of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the state of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that state. The general principle laid down in *Embree v. Hanna*, 5 Johns. 110, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the state where the process was served. In that case it was said: "All debts are payable everywhere unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. 2 Parsons, Contracts, 8th ed. 702 [9th ed. 739]. The debt involved in the pending [*226] case had no 'special limitation or provision in respect to payment.' It was payable generally, *and could have been sued on in Iowa, and therefore was attachable in Iowa*. This is the principle and effect of the best considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." The case recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there; and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really, in such proceeding, a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the \$180 which he owed Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the state of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. [*227] Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan v. Neville*, 74 Pa. 52, and is spoken of in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the

Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should at any time within a year and a day, [*228] appear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the Maryland court, and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some \$344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

Mr. Justice Harlan and Mr. Justice Day dissented.

LOUISVILLE & N. RY. CO. v. DEER, in U. S. Sup. Ct., Jan. 2, 1906—
200 U. S. 176, 50 L. ed. 426, 26 S. Ct. Rep. 207.

In error to the supreme court of Alabama by the Louisville & N. Ry. Co., to reverse a judgment affirming a judgment in debt, rendered against plaintiff in error by the city court of Montgomery.

Plaintiff in error was not a corporation under the laws of Florida, but operated a railway there. The other facts appear by the opinion.

HOLMES, J. This is an action to recover a debt admitted to have been due to the plaintiff, the defendant in error. But it was agreed [*178] in the trial that a suit was brought by one Brock against the plaintiff in Florida, in which the railroad company, the present plaintiff in error, was summoned as garnishee, judgment was recovered against the latter as such for the sum now in suit, and the sum paid by it into court, all before the present suit was begun. The proceedings in Florida were strictly in accordance with the laws of that state. The railroad company did business there and was permanently liable to service and suit, and the defendant, the present defendant in error, was notified by such publication as the statutes of Florida prescribed. He was not, however, a resident of the state, but lived in Alabama, and the supreme court of the latter state affirmed a judgment in his favor on the ground that the Florida court had no jurisdiction to render the judgment relied on as a defense.

Whatever doubts may have been felt when this case was decided below are disposed of by the recent decision in *Harris v. Balk*, 198 U. S. 215. There the garnishee was only temporarily present in Maryland, where the first judgment was rendered, and the defendant in that judgment was absent from the state, and served only as the defendant in error was served in Florida. Yet the Maryland judgment was held valid, and a decision by the supreme court of North Carolina denying the jurisdiction of the Maryland court was reversed. In the present case the railroad company was permanently present in the state where it was served. In view of the full and recent discussion in *Harris v. Balk* we think it unnecessary to say more.

Judgment reversed.

ROLLER v. HOLLY, in U. S. Sup. Ct., Feb. 26, 1900—176 U. S. 398,
20 S. Ct. 410.

Action by Roller to recover on five notes for \$228 each, and to foreclose a vendor's lien therefor. From a judgment of the trial court denying the vendor's lien he sued error in the Texas court of civil appeals, where the judgment below was affirmed. Then he sued error in the supreme court of Texas, which again affirmed the judgment, and he now sues error here.

Brown, J. Briefly stated, the case is this: Roller, the plaintiff, who was a resident of Virginia, bought this land in January, 1887, gave a note in part payment for \$216.17, which passed into

the hands of McClintic & Proctor, who brought suit thereon for a personal judgment against the plaintiff, and for the foreclosure of a vendor's lien upon the land, served plaintiff with notice of the suit in Virginia, December 30, 1890, to appear in Texas January 5, 1891, and took judgment against him by default January 9, 1891, for \$276.65, and for a foreclosure of the lien. Upon a sale in pursuance of this foreclosure, March 3, 1891, the land was struck off to Williams and Jackson, and by them sold to Peoples.

Meantime, however, and on January 1, 1890, a year before the McClintic & Proctor suit was begun, plaintiff sold the land to the Hollys, who went into possession, and took from them five notes of \$228 each, and also reserved a vendor's lien, which he sought to foreclose in this suit. Williams, Jackson, and Peoples, who purchased the land under the sheriff's sale in the McClintic & Proctor suit, were made parties defendant, and now aver that the plaintiff's title passed to them, which plaintiff denies upon the ground that no process was served upon him within the state of Texas, or within a reasonable time before he was required to appear and answer.

The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham County, Virginia, December 30, 1890, to appear in Limestone County, Texas, on January 5, 1891, to answer the foreclosure suit, is due process of law within the meaning of the Fourteenth Amendment? The Hollys, who bought this land and went into possession a year before the McClintic & Proctor suit was begun, were not made parties to that suit, probably because the deed from the plaintiff to them was not on record in Limestone County at the time of the institution of the suit, and their rights are not involved here. It is conceded that the McClintic & Proctor judgment is invalid as a personal judgment against the plaintiff under the case of *Pennoyer v. Neff*, 95 U. S. 714, 723, and other cases in Texas of the same import.

1. The position of the plaintiff that, as there was no statute in Texas authorizing a suit against a non-resident to enforce an equitable lien for purchase money, and as there had been no seizure *in rem* of the lands, nor any notice to Roller's vendees, the Hollys, who were in possession, the jurisdiction of the Texas courts could not attach, and the whole proceeding was void, is unsound.

[*403] In the case of *Hart v. Sansom*, 110 U. S. 151, 3 S. Ct., 586, relied upon in support of this contention, an action of ejectment was brought against several defendants, who set up

in defence a judgment against the plaintiff as one having some pretended claim or title to the lands, and other defendants holding recorded deeds thereof, which were averred to be fraudulent and void. Plaintiffs in that suit averred that these pretended deeds and claims cast a cloud upon their title; and that one of the defendants had ejected them from the lands and withheld possession from the plaintiffs. Due service was made on the other defendants, and a citation to Hart, who was a citizen of another state, was published as directed by the local statutes. All the defendants were defaulted, and upon a writ of inquiry the jury found that Hart claimed the land, but had no title by record or otherwise, and returned a verdict for the plaintiffs upon which judgment was entered for a recovery of the land, the cancellation of the deeds, and the removal of the cloud upon the title. It was held that this judgment was no bar to an action by Hart in the Circuit Court of the United States, to recover the land against Sansom, who held under a lease from the plaintiffs in the former suit. We held that none of that judgment was applicable to Hart, since that part which was for recovery of possession could not apply to him, as he was not in possession; and that part which was for the cancellation of the deeds set up in the petition, was a decree *in personam* merely, and could only be supported against a non-resident of the state by actual service upon him within the jurisdiction of the state, and that constructive service by publication was not sufficient. Neither of the plaintiffs, however, was in possession of the land nor claimed a lien thereon.

In *Arndt v. Griggs*, 134 U. S. 316, it was held directly that a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a non-resident defendant is brought into court by publication. It appeared in that case that a suit had been begun by a party alleging that he was the owner and *in possession* of the land in controversy, by virtue of certain tax deeds, against defendants claiming to have some title or interest in [*404] the lands by patent from the United States, which title, as was alleged, was divested by the tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title, and that the suit was brought for the purpose of quieting such title. The defendants were brought in by publication, and a decree entered in favor of plaintiff quieting his title. The question was whether that decree was a bar to an action in ejectment between the grantees of the respective parties to the proceedings to quiet title. In other words, as put by the

court: "Has a state the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication?" The question was answered in the affirmative. In delivering the opinion of the court Mr. Justice Brewer observed: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon each title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice. * * * Mortgage liens, mechanic's liens, [*405] materialmen's liens and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

This case is readily distinguishable from that of *Hart v. Sansom* in the important fact that the plaintiffs in the judgment set up as a defence in that case were *out of* possession while the defendants *in* possession, and the action was really in ejectment with a somewhat superfluous prayer for the cancellation of all the deeds under which the defendants claimed title. In *Arndt v.*

Griggs the plaintiffs were in possession, under tax deeds it is true, but having a *prima facie* valid title which they sought to vindicate against the former owners.

The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain state, he may institute proceedings against non-residents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.

In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class *Cooper v. Reynolds*, 10 Wall. 308, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands, which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him, and it was held by this court that Reynold's title to [*406] the land had been divested by the attachment proceedings, upon the ground that, in this class of cases, the levy of the attachment gave the court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the courts may enforce; and if a lien already exists, whether by mortgage, statute, or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.

It is true there is no statute of Texas specially authorizing a suit against a non-resident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and non-resident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the Supreme Court of Texas in *York v. State*, 73 Texas, 651; *Kimmearle v. Houston & Texas Central Railway*, 76 Texas, 686; *Maddox v. Craig*, 80 Texas, 600; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 723. The article must then be restricted to actions *in rem*; but to what class of actions, since none is men-

tioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against non-resident defendants. In the case of *Hollingsworth v. Barbour*, 4 Pet. 466, relied upon by the plaintiff, a statute of Kentucky authorized suits in chancery against non-residents "where any person or persons, their heirs or assigns, claim land as locator, or by bond or instrument in writing;" and as the plaintiff in the case did not claim as locator, it was held that the court acted without authority, and that the decree was void for want of jurisdiction. Where the statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the [*407] Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the court of civil appeals, and apparently by the supreme court of the state, and is obligatory upon this court as a construction of a state statute. *Battle v. Carter*, 44 Texas, 485; *Oswald v. Kaufmann*, 28 Fed. Rep. 36, a Texas case; *Martin v. Pond*, 30 Fed. Rep. 15.

2. We are therefore remitted to the principal question in dispute between these parties, namely, the sufficiency of the notice given to the plaintiff of the McClintic & Proctor suit. In this connection our attention is called to certain articles of the Texas Code, the first one of which, Art. 1228, Sayles' Texas Civil Statutes, provides generally for the service of process by giving five days' notice, exclusive of the day of service and of the return day. In addition to this there are the following sections:

Art. 1230. "Where the defendant is absent from the state, or is a non-resident of the state, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the court, naming such time and place. Its style shall be 'The State of

Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

Art. 1234. "Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this state."

[*408] Art. 1280. " * * * The fifth day of each term of the district court and the third day of each term of the county court are termed appearance days."

Art. 1281. "It shall be the duty of the court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

Art. 1340. "Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators, and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the days of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other states, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. In the case under consideration it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham County, Virginia, to

appear on January 5, 1891, at Groesbeck, Limestone County, Texas; that it would have required four days of constant travelling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit. It is true that, by articles 1280 and 1281, the case could not have been called for trial or default until the fifth day [*409] of the term, January 9, and that Roller's default was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas courts in that particular, and was at liberty, even if he was not compelled, to construe the notice as it read upon its face. Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.

That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation District*, 111 U. S. 701-712. What shall be deemed a reasonable notice admits of considerable doubt. In the case of a witness subpoena the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defence.

In 2 Chitty's General Practice, 175, it is said in reference to summary proceedings before justices of the peace: "The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition

of improper hurry, or he may incur the censure of the Court of King's Bench, if not be subject to a criminal information. [*410] The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should not be required, *omissis omnibus aliis negotiis*, instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defence." In vol. 2, page 144, it is said that the ancient practice was that a person residing at a considerable distance from a metropolis should be allowed more time for performing the act than a person within, or near, the metropolis, but that there is now no distinction between an arrest on process in London or Yorkshire, and in each case the defendant must appear or put in bail within eight days after the date of service or arrest. This, considering the small area of the kingdom, and the rapid means of transportation, seems just and reasonable.

While, as before stated, there is but little in the way of judicial authority upon the question, in the statutes of the several states regulating proceedings against absent and non-resident defendants, there is a consensus of opinion, which is entitled to great weight in passing upon the question of the reasonableness of such notice.

In the act of Congress providing for the enforcement of liens upon property as against non-residents, Rev. Stat. § 738, the court is required to make an order fixing a day certain, which shall be served on the absent defendant wherever found, or, if personal service be impracticable, such order shall be published once a week for six consecutive weeks, with a proviso that, if there be no personal service, he shall have one year after final judgment to enter his appearance, and set aside the judgment. The same proviso allowing the court to fix the time of appearance is found in the statutes of Massachusetts, New Hampshire, Pennsylvania, Alabama, Maryland and Virginia.

[*411] By the sixth rule of this court, a party moving to dismiss must give a notice of at least three weeks, and where counsel

to be notified reside west of the Rocky Mountains, a notice of at least thirty days.

By the Code of Civil Procedure of New York, sec. 440, the judge is required to make an order for publication once a week for six consecutive weeks, and in addition thereto the plaintiff, on or before the day of the first publication, is bound to mail a copy of the summons, complaint and order for appearance to the non-resident defendant. By sec. 2525, citations from Surrogate's Courts must be served on non-residents at least thirty days before the return day.

By the General Statutes of Vermont, (1894) §§ 1641, 1643, non-resident defendants (served out of the state) are entitled to at least twenty days' notice before the time when they are required to appear.

By the practice in Michigan, the court orders the absent or non-resident defendant to appear in not less than three months, if he be a resident of the state, absent or concealed, and if a resident of some other of the United States or of the British provinces, in not less than four months; and if a resident of any foreign state, in not less than five months from the date of making the order; and if the order be not published for six successive weeks, defendant shall be personally served at least twenty days before the time prescribed for his appearance. 2 Howell's Statutes, §§ 6670, 6671 and 6672.

By the Revised Statutes of Illinois, (1899) chapter 22, § 14, there must be either publication or a personal service upon the non-resident defendant, "not less than thirty days previous to the commencement of the term at which such defendant is required to appear."

By the General Statutes of New Jersey, (1895) Vol. 1, page 405, the chancellor may order the non-resident defendant to appear not less than one nor more than three months from the date of the order; "of which order such notice as the chancellor shall by rule direct shall, within ten days thereafter, be served personally on such defendant," or be published for four weeks. This gives the defendant at least twenty days' personal notice.

[*412] By the General Statutes of Arkansas, (1894) §§ 5677, 5678, a non-resident defendant is entitled to a copy of the complaint and the summons warning him to appear and answer "within sixty days after the same shall have been served on him."

By the Code of Georgia, (1895) § 4979, the party obtaining an order for the appearance of a non-resident defendant shall

file in the office of the clerk, at least thirty days before the term next after the order for publication, a copy of the newspaper in which said notice is published, which the clerk is required to at once mail to the party named in the order; and, by sec. 4980, the judge is required to determine whether the service has been properly perfected.

By the Revised Statutes of Florida, (1892) § 1413, the clerk must publish the order for the appearance of a non-resident defendant once a week for four consecutive weeks, and also, within twenty days after the making of the order, mail a copy to the defendant, if his residence be shown by the bill or affidavit.

By the Code of Montana, (1895) § 638, publication must be made for four successive weeks, and, where the residence of the defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the post office, directed to the person to be served at his place of residence. A similar practice also obtains in California.

By the General Statutes of Mississippi, (1892) § 3423, publication may be dispensed with, if the summons be served upon the absent party at least ten days before the return day. This is the shortest length of notice to be found in any of the statutes.

By the Code of Oregon, (1892) § 57, in case of publication, which must be not less than once a week for six weeks, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, addressed to the defendant, if his place of residence be known; and "in case of personal service out of the state, the summons shall specify the time prescribed in the order for publication."

It may be said in general, with reference to these statutes, that in cases of publication notice is required to be given at [*413] least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient. While, of course, these statutes are not obligatory here, they are entitled to consideration as expressive of the general sentiment of legislative bodies upon the question of reasonableness of notice.

Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable

notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action.

The judgment of the Court of Civil Appeals, affirming the judgment of the District Court of Limestone County, must therefore be reversed, with instructions to remand the case to that court for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE BREWER dissented.

TYLER v. JUDGES OF THE COURT OF REGISTRATION, in Mass. Sup. Jud. Ct., Jan. 5, 1900—175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.¹

HOLMES, C. J. This is a petition for a writ of prohibition against the judges of the Court of Registration established by St. 1898, c. 562, and is brought to prevent their proceeding upon an application concerning land in which the petitioner claims an interest. The ground of the petition is that the act establishing the court is unconstitutional. Two reasons are urged against the act, both of which are thought to go to the root of the statute and to make action under it impossible. The first and most important is that the original registration deprives all persons except the registered owner of any interest in the land without due process of law. There is no dispute that the object of the system, expressed in § 38, is that the decree of registration "shall bind the land and quiet the title thereto," and "shall be conclusive upon and against all persons," whether named in the proceedings or not, subject to few and immaterial exceptions. And this being admitted, it is objected that there is no sufficient process against, or notice to, persons having adverse claims, in a proceeding intended to bar their possible rights.

The application for registration is to be in writing and signed and sworn to. It is to contain an accurate description of the land, to set forth clearly other outstanding estates or interests known to the petitioner, to identify the deed by which he obtained title, to state the name and address of the occupant if

¹Writ of error to reverse this decision was dismissed on motion in the Supreme Court of the United States, because no interest of petitioner in the proceeding appeared or if he was interested he had knowledge of the proceeding, and so had no ground to object. To this Fuller, C. J., and Harlan, Brewer, and Shiras, JJ., dissented. *Tyler v. Judges of Court of Registration* (1900), 179 U. S. 405, 45 L. ed. 252, 21 S. Ct. 206.

there is one, and also to give the names and addresses so far as known of the occupants of all lands adjoining. § 21. As soon as it is filed, a memorandum containing a copy of the description of the land concerned is to be filed in the registry of deeds. § 20. The case is immediately referred to an examiner (appointed by the judge, § 12), who makes as full an investigation as he can and reports to the court. § 29. If in the opinion of the examiner the applicant has a good title as alleged, or if the applicant after an adverse opinion elects to proceed further, the recorder is to publish a notice by order of the court in some newspaper [*73] published in the district where any portion of the land lies. This notice is to be addressed by name to all persons known to have an adverse interest, and to the adjoining owners and occupants so far as known, and to all whom it may concern. It is to contain a description of the land, the name of the applicant, and the time and place of the hearing. § 31. A copy is to be mailed to every person named in the notice whose address is known, and a duly attested copy is to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day. Further notice may be ordered by the court. § 32.

It will be seen that the notice is required to name all persons known to have an adverse interest, and this of course includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner, or in any way found to exist. Taking this into account, we should construe the requirement in § 21 concerning the application, as calling upon the applicant to mention not merely outstanding interests which he admits, but equally all claims of interest set up although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the constitution, either as to persons residing within the state upon whom it is not served, or as to persons residing out of the state and not named.

If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed certainty against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the Supreme Court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is im-

possible in this country. *State v. Gilbert*, 56 Ohio St. 575, 629. But we cannot bring ourselves to doubt that the Constitutions of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims [*74] without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case. *Wheeler v. Jackson*, 137 U. S. 245, 258, 11 S. Ct. 76. The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing half way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the *mise* joined and the lapse of a year and a day; Booth, Real Actions, 101, *in margine*; Fitz. Abr. Continual Claim, pl. 7, *Faux Recorre*, pl. 1; Y. B. 5 Ed. III. 51, pl. 60; and of a fine with proclamations after the same time or by a later statute after five years. 2 Bl. Com. 354; 2 Inst. 510, 518; St. 18 Ed. I., *modus levandi fines*; 34 Ed. III. c. 16; 4 & 5 Hen. VII. c. 24; 32 Hen. VIII. c. 36. It would have astonished John Adams to be told that the framers of our constitution had put an end to the possibility of these ancient institutions. A somewhat similar statutory contrivance of modern days has been held good. *Turner v. New York*, 168 U. S. 90, 18 S. Ct. 38. Finally, as was pointed out by the counsel for the petitioner, a proceeding *in rem* in the proper sense of the word might give a clear title without other notice than a seizure of the *res* and an exhibition of the warrant to those in charge. 2 Browne, Civ. & Adm. Law, 398. The general requirement of advertisement in admiralty cases is said to be due to rules of court. U. S. Adm. Rule 9. Betts, Adm. Practice (1838), 33, 34, App. 14.

The prohibition in the Fourteenth Amendment of the Constitution of the United States against a state depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice; *Murray v. Hoboken Land & Improvement Co.* 18 How. 272, 277; or which may be found in convenience and substantial justice, although the form is new. *Hurtado v. People*, 110 U. S. 516, 528, 531, 4 S. Ct. 111; *Holden v. Hardy*, 169 U. S. 366, 388, 389, 18 S. Ct. 383. The prohibitions must

be taken largely, with regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show [*75] a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado v. People*, 110 U. S. 516, 537, 4 S. Ct. 111.

Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within the state or notice by name to those outside of it, and not encounter any provision of either constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible, were this not so, for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. *Pennoyer v. Neff*, 95 U. S. 714, 727; *The Mary*, 9 Cranch, 126, 144; *Mankin v. Chandler*, 2 Brock. 125, 127; *Brown v. Levee Commissioners*, 50 Miss. 468, 481. *Freem. Judgments*, (4th ed.) §§ 606, 611. In *Hamilton v. Brown*, 161 U. S. 256, 16 S. Ct. 585, a judgment of escheat was held conclusive upon persons notified only by advertisement to all persons interested. It is true that the statute under consideration required the petition to name all known claimants, and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat just cited, the conclusive effect of the decree is not put upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*. *Bonnemort v. Gill*, 167 Mass. 338, 340. See 161 U. S. 263, 274. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In *Arndt v. Griggs*, 134 U. S. 316, 327, 10 S. Ct. 557, it is said to be established that "a state has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication." In *Hamilton v. Brown*, 161 U. S. [*76] 256, 274, it was declared to be within the power of a state

"to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." I doubt whether the court will not take the further step when necessary, and declare the power of the states to do the same thing after notice by publication alone. See *Huling v. Kaw Valley Railway & Improvement Co.* 130 U. S. 559, 564, 9 S. Ct. 607; *Parker v. Overman*, 18 How. 137, 140, 141 *et seq.* But in the present case provision is made for notice to all known claimants by the recorder, who is to mail a copy of the published notice to every person named therein whose address is known. § 32. We shall state in a moment our reasons for thinking this form of notice constitutional. See further *Cook v. Allen*, 2 Mass. 462, 469, 470; *Dascomb v. Davis*, 5 Met. 335, 340; *Brock v. Old Colony Railroad*, 146 Mass. 194, 195.

But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to or possession of a tangible thing. *Mankin v. Chandler*, 2 Brock. 125, 127. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. Freem. Judgments, (4th ed.) § 606 *ad fin.* All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in the admiralty; it need not even be a tangible thing at all, as (*77] sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result, nothing more.

It is true as an historical fact that these symbols are used in admiralty proceedings, and also, again merely as an historical fact, that the proceedings *in rem* have been confined to cases where certain classes of claims, although of very divers sorts,—for indemnification for injury, for wages, for salvage, etc.,—are to be asserted. But a ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact. There is no *a priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice affords no test of the powers of the legislature. The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indicating that the proceeding is against property alone, that is to say, that it is not to establish an infinite personal liability, is not of the essence. If, in fact, the proceeding is of that sort, and is to bar all the world, it is a proceeding *in rem*.

Then as to seizure of the *res*. It is convenient in the case of a vessel, in order to secure its being on hand to abide judgment, although in the case of a suit against a man jurisdiction is regarded as established by service without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said to be notice to the owner. *Scott v. Shearman*, 2 W. Bl. 977, 979. *Mankin v. Chandler*, 2 Brock. 125, 127. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, when we come to deal with immovables there [*78] would be no sense whatever in declaring seizure to be a constitutional condition of the power of the legislature to make a proceeding against land a proceeding *in rem*. *Hamilton v. Brown*, 161 U. S. 256, 274, 16 S. Ct. 585. The land cannot escape from the jurisdiction, and, except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience.

I do not wish to ignore the fact that seizure, when it means

real dispossession, is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference; or rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view. I am free to confess, however, that, with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration.

The quotations which we have made show the intent of the statute to bind the land, and to make the proceedings adverse to all the world, even if it were not stated in § 35, or if the amendment of 1899 did not expressly provide that they should be proceedings *in rem*. St. 1899, c. 131, § 1. Notice is to be posted on the land just as admiralty process is fixed to the mast. Any person claiming an interest may appear and be heard. § 34.

But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind, but for the purposes of decision a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them, it is not in the power of the legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the [*79] necessity of giving such a notice, and to assume that under this statute personal rights in property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained.

It hardly would be denied that the statute takes great precautions to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state and remaining undiscovered, notice by publication must suffice of necessity. As to claimants living within the

state and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post office beside publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the Legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required. We agree that such an act as this is not to be upheld without anxiety. But the difference in degree between the case at bar and one in which the constitutionality of the act would be unquestionable seems to us too small to warrant a distinction. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done.

We do not think it necessary to refer to the elaborate collection of statutes presented by the attorney general for the purpose of showing that the principle of the present act is old. [*80] Although no question is made on that point, we may mention that an appeal is given to the Superior Court with the right to claim a jury. In our opinion, the main objection to the act fails. See *Shepherd v. Ware*, 46 Minn. 74; *People v. Simon*, 176 Ill. 165; *Short v. Caldwell*, 155 Mass. 57, 59; *Loring v. Hildreth*, 170 Mass. 328.

The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and assistant recorder. * * *

Finally, it is said that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. * * * *Petition denied.*

The part of the opinion discussing the objection that the law is unconstitutional because it contemplates a delegation of judicial power by the courts to examiners and gives appointing power to the courts, whereas by the constitution officers are to be elected by the people or

appointed by the governor, &c., is omitted; also, the dissenting opinion of Loring, J., concurred in by Lathrop, J.

ACCORD: *Robinson v. Kerrigan* (1907), 151 Cal. 40, 90 Pac. 129; *People ex rel. Smith v. Crissman* (1907), 41 Colo. 450, 92 Pac. 949; *People ex rel. Deneen v. Simon* (1898), 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *State ex rel. Douglas v. Westfall* (1902), 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297.

CONTRA: *State ex rel. Monnett v. Guilbert* (1898), 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 105, 60 Am. St. Rep. 756.

Jurisdictional Effect of Departures from Prescribed Form and Procedure.

GREENVAULT v. FARMERS AND MECHANIS' BANK, in Mich. Sup. Ct., Jan. Term, 1847—2 Doug. 498.

Ejectment in the Lenawee circuit court by David Greenvault against the President, Directors and Company of the Farmers and Mechanics' Bank. Case reserved for the opinion of this court. Judgment for defendant.

Greenvault claims under attachment proceedings instituted in the Lenawee circuit by C. N. Ormsby against Ed. Bissell, Sept. 28 and levied Oct. 9, 1838, culminating in judgment for Ormsby, Greenvault, and several other creditors who filed claims, in October, 1839, and a sale to Greenvault-thereunder, May 2, 1840. The Farmers and Mechanics' Bank claims under a mortgage executed to it by Bissell, Dec. 23, 1838, and since foreclosed. Bissell moved the court at the April term, 1842, to set the attachment and the proceedings thereon aside, because the attachment affidavit was void. The court refused this motion and allowed a new attachment affidavit to be then filed, on authority of the act of April 20, 1839. The tenant of the bank was in possession when this action was commenced.

WHIPPLE, J. The paper purporting to be an affidavit, filed with the clerk as the foundation of the attachment against Bissell under which the plaintiff claims, was sworn to before the clerk of the circuit court of Lenawee county, in vacation. * * * No provision conferring such authority is to be found in the Revised Statutes of 1838; and it follows, as a necessary consequence, that the act of the clerk in administering the oath, was extrajudicial and void. * * *

The next question to be determined, is, whether the issuing of the writ, without an affidavit, was also void; or, in other words,

did the authority to issue the process, depend upon the making and filing of the affidavit with the clerk? This question must be answered in the affirmative. * * * [*507]

The next inquiry is, what was the legal effect of issuing the writ without making and filing the affidavit required by law, upon the judgment and subsequent proceedings of the circuit court. This inquiry is answered by the opinion of this court in the cases of *Palmer v. Oakley*, 2 Doug. Mich. 433; *Wight v. Warner*, 1 *ibid.* 384, and *Clark v. Holmes*, *ibid.* 390. In the case first named, we recognized the rule as laid down in the case of *Elliott v. Peirsol*, 26 U. S. (1 Peters) 328, 340, and the decision of a court which has acquired jurisdiction of a cause, will be held binding until reversed; but that if a court act without authority, its judgments will be regarded as nullities; and that the jurisdiction of a court exercising authority over a subject matter, may be inquired into in every court where the proceedings of the former are relied on, by a party claiming the benefit of such proceedings. The rule thus laid down, is firmly established by the numerous decisions referred to in that case, and is recognized in all courts, where the common law prevails, as too firmly settled to be shaken. Another rule, sustained by an unbroken current of decisions in this country and England is, that where a court is vested with extraordinary powers, under a special statute prescribing its course, that course ought to be exactly observed; and the facts which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. These principles are applicable to all courts, whether of inferior or superior jurisdiction; the only difference being, that in respect to inferior courts, jurisdiction must appear on the face of the proceedings; while, in regard to superior courts, jurisdiction will be presumed, until the contrary is shown. It will be unnecessary, at this time, to recur to the reasoning [*508] or authorities by which these propositions are sustained, as the cases to which I have referred, contain not only a full exposition of our views upon those propositions, but a full citation of many of the leading authorities by which they are established.

Nothing remains for us but to apply the principle laid down by us in those cases, to the questions now before us. What, then, was the character of the court, and the nature of the jurisdiction it exercised in suits in attachment? The circuit court was a court of general common law jurisdiction, in both civil and criminal cases. Its *general* powers are clearly defined by statute. It was,

in other words, a court of superior jurisdiction. Do proceedings in attachment fall within the circle of the general powers conferred upon the circuit court by statute? They clearly do not. The jurisdiction in this respect is special and extraordinary. The mode of proceeding is peculiar, and in derogation of the common law. It is special, because limited to cases either of absconding or non-resident debtors. It is extraordinary, because the process, contrary to the general rule recognized in our statutes, acts upon the property and not the person of the debtor. It is, in its nature, a proceeding *in rem*, to collect a debt due from a debtor to his creditor. It is in derogation of the common law, because it is a direct proceeding to subject the real estate, by actual sale, to the payment of debts.

I have already said that there was no preliminary proof whatever to authorize the issuing of the attachment. The *facts* which give jurisdiction, do not appear in the proceedings. In the absence of such proof, what, it may be asked, is the judgment which the law pronounces upon such proceedings? There being no authority to issue the process, it is of course void. Being void, the *service* was void; the property attached never was brought within [*509] the jurisdiction of the court, and the court had no authority to order its sale. In short, the circuit court never had jurisdiction of the subject matter, because the facts necessary to call that jurisdiction into exercise never existed. Can a party, then, to such proceedings—one who stood in the character of a plaintiff, so far as the prosecution of his own claim was concerned—protect himself, under a sale made by virtue of an order entered in the records of a court which never acquired jurisdiction of the subject matter—a court within whose jurisdiction the property never was brought? As well might it be contended that a judgment, where the proceedings are *in personam*, could be sustained, when it affirmatively appears in the record, that the person to be affected by the judgment never was brought within the jurisdiction of the court by whom it was rendered. The distinction is well defined between cases where jurisdiction is acquired, and is improvidently exercised, and cases where jurisdiction never was acquired. In the first class of cases the judgment will bind until reversed. In the other, the judgment is a mere nullity; it is as though it had never been entered. In the first class, the record cannot, in general, be impeached, in the last it may be impeached, especially if it shows on its face that jurisdiction was usurped. Acts done by a court, without authority, are equally as void, and

for the same reason, as acts done without authority by either the executive or legislative departments of the government. If either of these departments usurp an authority not conferred by the constitution or laws of the state, and a party seeks to shelter himself under such usurped authority, in a judicial proceeding, the court before whom such a proceeding is pending, would not hesitate to declare all acts done under such authority void. If not, then we should have to submit quietly to the well merited rebuke, that rights the most sacred are no [*510] longer guarded and protected by just laws enacted by our consent; but are left to the tender mercies of a man or set of men, who, although acting under color of authority, are mere usurpers. Apply this reasoning to the case before us. The powers possessed over the person and property of the citizen, by the judicial tribunals, are as accurately defined as are the powers conferred upon the other departments of the government. In the particular case before us, the circuit court of Lenawee county was authorized, by a judicial proceeding, to divest one person of his property and transfer it to another, under a certain state of facts. The facts, however, which authorized the act to be done, did not exist; nevertheless, the court proceeded to do the act, by which, under color of legal proceedings, one man is divested of his estate, and it is transferred to another. What difference, it may be asked, is there between such an act, and an act of the legislature which should declare that the property of A. should become the property of B. No difference in principle exists between the two cases. In the one case, it would be regarded as a bold and palpable usurpation; in the other, the usurpation would appear less bold, although more dangerous, because partially concealed beneath the solemn drapery with which judicial proceedings are invested. The theory of our government contemplates that its powers should be distributed, and administered by three departments, neither of which should exercise powers conferred upon another. This principle, so necessary to the existence of free government, should be carefully observed; yet, it is to be regretted, that, to suit the emergencies of particular cases, courts of justice have sometimes assumed legislative powers. Not contented with expounding the law, they have resolved themselves into legislative bodies, and made laws adapted to the supposed equities of particular cases. The opinions of men are thus [*511] substituted for the will of the community expressed through the legislature. In the case before us, the legislature have thought proper to give to the circuit court

jurisdiction in certain cases, and upon certain conditions. To call this jurisdiction into exercise, it must be shown that the conditions upon which it depended have been fulfilled; and where this jurisdiction is special and extraordinary, not falling within the line which circumscribes the general powers of the court, it would seem that the record itself should show affirmatively the existence of all the facts necessary to call into action the special powers thus granted. 3 Blackf. R. 230.

Much reliance was placed upon the case of *Voorhees v. Bank United States*, 35 U. S. (10 Peters) 449, 473. But the distinction between that case and the one before us is so obvious as to render it impossible to use it as an authority. 1. In that case, Voorhees was the alienee of Cutter, who was the defendant in the attachment, by a conveyance executed long after the judgment in attachment. Cutter, then, stood in no better plight than Voorhees would have done, had he brought suit against the bank. 2. It was competent for Voorhees to have brought error upon the judgment, which he failed to do. In the case before us, the defendants could not have availed themselves of this remedy to reverse the proceedings below. 3. Stanley, under whom the Bank of the United States purchased, was regarded in the light of an innocent purchaser; whereas, in the case before us, the plaintiff was a party to the proceedings in attachment, and was bound to see that the court had jurisdiction. The Supreme Court of the United States decided in that case, that from what appeared on the face of the proceedings, it might be fairly presumed that all the facts necessary to give jurisdiction to the court of common pleas of Ohio, were shown to that court before the rendition of the judgment confirming the acts of the [*512] auditors. In the case before us, nothing is left to implication. The verdict sets out all the proceedings, from which it manifestly appears that there was no affidavit proving the facts necessary to confer authority upon the circuit court to issue the process. * * *

It is not to be denied, that some of the views expressed by Mr. Justice Baldwin, touching the conclusiveness of judgments rendered in attachment causes, differ essentially from those expressed by other judges and courts of great respectability. * * *

The last question to be considered, is, as to the legal [*513] effect of the filing a new affidavit, by the plaintiff, by virtue of the order made at the April Term, 1842, of the circuit court.

First: Was it competent to grant the order? The act of 1839 provides, that "no writ shall be quashed on account of any

defect in the affidavit on which the same issued: *Provided*, That the plaintiff, his agent, or attorney shall, whenever objection may be made, file such affidavit as is required by law." S. L. 1839, p. 228, § 36. This law, it is to be observed, was not in force at the time the paper purporting to be an affidavit, and upon which the attachment was issued, was filed. Do the words of the act authorize a new affidavit to be filed, where the original affidavit was void; or, in other words, where no affidavit was made or filed, as contemplated by the statute? The amendatory act speaks of *defects* in the *affidavit* upon which the writ issued; from which it results, by necessary implication, that *defects* could not be supplied, in cases where no affidavit whatever was filed. It evidently contemplated cases where affidavits were filed, but which, through ignorance, inadvertence, or mistake, did not embody all the facts necessary to authorize the issuing of the writ; but it could not have been the intention of the legislature to authorize an affidavit to be filed after judgment was rendered and the property attached sold, and thus legalize acts which were absolutely void. The language, in the latter part of the act, is conclusive upon this point. It authorizes a party to "file such affidavit as is required by law"; implying that the original *affidavit* was *not* such as is required by law. In the case before us, if the construction contended for by the plaintiff, be correct, an affidavit filed three years after the rendition of the judgment, would have the effect of rendering a proceeding legal, which was before that time a mere nullity;—of giving jurisdiction to a court, which, at the time the [*514] writ issued and the judgment was rendered, had no jurisdiction. Such a power the legislature would hardly exercise: and there is nothing in the amendatory act, from which it can, with any show of reason, be contended that such was the intention of the legislature.

But, supposing for a moment, that the legislature might, in the plenitude of its authority, exercise such a power, and that the act of 1839 warrants the construction contended for by the plaintiff, how could it affect the rights of the present defendants? The filing, with the register, of the writ of attachment, did not operate as constructive notice to the defendants, who purchased soon after the date of the writ, or create a lien on the premises, for the reason that the writ itself was void. To affect a party with notice, the deed, or in this case, the writ, must be such an one as in the case of a deed, the law authorizes to be registered, or in the case of a writ, it must be a writ, the issuing of which is authorized by law.

The special verdict does not find that the defendants had *actual* notice of the pendency of the proceedings in attachment. There being, then, neither actual nor constructive notice, how could the rights of the defendants be affected by an order of the court made three years after they had acquired a valid title to the premises? No *ex parte* legislation, or order of the court founded upon such legislation, could, under the circumstances stated in the special verdict, have the effect claimed for it, viz: that of divesting an estate acquired by the defendants from Bissell, and transferring it to the plaintiff in this case. The original proceedings in attachment, then, being void, and no subsequent legislation, or orders of the court, having applied remedies sufficiently potent to cure those proceedings of the infirmities which beset them, it follows, that the judgment on the special verdict must be rendered for the defendants.

Certified accordingly.

COOPER v. REYNOLDS, in U. S. Sup. Ct., Dec., 1870—77 U. S. (10 Wallace) 308.

Ejectment by Reynolds against Cooper in the circuit court for the eastern district of Tennessee. From judgment for plaintiff, defendant brings error.

On the trial it was admitted that Reynolds owned the land unless Cooper had acquired title by virtue of the following described judicial proceedings. The record in the case of Brownlow v. Reynolds in the circuit court for Knox county, Tennessee, which was put in evidence by Cooper, showed that on Sept. 26th, 1853, G. W. Brownlow sued out of that court a summons in trespass against said Reynolds and others for false imprisonment, &c.; damages, \$25,000. To this writ the sheriff returned that "he had made search and that none of the defendants were to be found in his county." The day the writ was issued Brownlow filed with the clerk of the court an affidavit for attachment against the property of said Reynolds and the others; alleging, among other things, "that all of the defendants have fled from this state or that they so abscond or conceal themselves that the ordinary process of law cannot reach them." In the record is also an attachment bond for \$50,000, and an attachment for \$25,000, all bearing the same date. The attachment recites the substance of the affidavit, and directs the sheriff to attach sufficient of the property of Reynolds and the others to satisfy the said demand of \$25,000, and hold the same ready to be disposed of as the court

should direct. To this attachment the sheriff returned that he had thereon attached all the title and right of Reynolds in 160 acres of land, the property now in controversy, describing it. The court ordered publication to be made in the Knoxville Whig, a county paper, notifying the defendants to appear and plead, answer, or demur, or the suit would be taken as confessed as to them and proceeded in *ex parte*. The record does not show that this publication was ever in fact made, except inferentially by setting out the order for publication, which was entitled, "Order for publication and *the publication as made in the Knoxville Whig.*" The record goes on to say that the defendants, being solemnly called to come into court, came not, but made default, and it appearing that the attachment has been duly levied, *and that publication has been made according to law*, it is ordered that the plaintiff do recover his damages. These were assessed at \$25,000, and for that sum execution was ordered to issue, and that the sheriff should sell the attached land. The land was accordingly sold by the sheriff under a *venditioni exponas*, and deed made to Cooper, as purchaser, who was put into possession under a *haberi facias*, issued from the same court in the same proceeding.

The record being thus in evidence the court instructed the jury that the sheriff's deed was null and void, and conveyed no title, because the judgment on which the sale was made was void for want of either personal service on or appearance by the defendants therein, or a valid attachment; and that the attachment was void because it does not appear that publication was ever in fact made and because the affidavit did not conform to the law. Verdict being found for the plaintiff under the instructions of the court, defendant alleges as error that the instructions were not correct.

MILLER, J. The objections taken to the proceeding in attachment under which Cooper, the defendant below, claimed title, are, 1st, that by the law of Tennessee the attachment could not be issued, at the beginning of the suit where the action was *ex delicto*, but could only be issued after suit commenced; 2d, that the affidavit was defective; 3d, that there was no publication of notice, as required by the statutes.

The question of the conformity of these proceedings to the requirements of the statutes under which they were had, has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the state court under which the land was sold, we might not find it easy to affirm or reverse

the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts. But we occupy no such position. The record of this case is introduced collaterally as evidence of [*316] title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the Supreme Court of Tennessee.¹

It is necessary, therefore, in the present case to inquire whether the errors alleged affect the jurisdiction of the court.

It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of [*317] process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

¹ *Harvey v. Tyler*, 2 Wall. 328, and cases there cited; *McGavock v. Bell*, 43 Tenn. (3 Cold.) 512; *Stevenson v. McLean*, 24 Tenn. (5 Hump.) 332, and cases cited.

It is to be observed that in reference to jurisdiction of the person, the statutes of the states have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.

When we come to the application of these principles to the case before us, that which leads to some embarrassment is the complex character of the proceeding which we are to consider. Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, [*318] and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued, and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final

judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, [*319] though the publication may have been duly made and proven in court.

Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So also of the publication of notice. It is the duty of the

court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice. We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the [*320] suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the state, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction. Such departures from the rules which should guide the court in the conduct of a cause are not errors which render its action void.

The case of *Voorhees v. The Bank of the United States*, 10 Peters 449, was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us. The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisalment of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding.

In the present case there is a sufficient writ of attachment, its levy and return, the judgment of the court, on trial by jury,

the order to sell the property, the sale under the *venditioni exponas*, the writ of possession, sheriff's deed and [*321] actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decisions in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities; and, after a careful examination of the reported cases on this subject, we believe this to be the law, as held by the courts of Tennessee.

Judgment reversed, and a new trial ordered.

FIELD, J., *dissenting*. I dissent from the judgment in this case. I am of opinion that the state court of Tennessee never acquired jurisdiction in the case of *Brounlow v. Reynolds*.

WINDSOR v. McVEIGH, in U. S. Sup. Ct., 1876—93 U. S. (3 Otto) 274

FIELD, J. This was an action of ejectment to recover certain real [*275] property in the city of Alexandria, in the state of Virginia. It was brought in the corporation court of that city, and a writ of error from the court of appeals of the state to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court. Authority for this mode of procedure will be found stated in the case of *Gregor v. McVeigh*, 23 Wallace 294.

The plaintiff in the corporation court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life-estate in them had been divested by a sale under a decree of condemnation rendered in March, 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the marshal of the district upon such sale.

The proceedings mentioned were instituted under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July, 1863, the premises in controversy were seized by the marshal of the district, by order of the district attorney, acting under instructions from the attorney-general. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had,

since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and in various ways had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act in compliance with instructions from the attorney-general, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer that process of monition might issue against the owner or owners of the property and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and, as the owner of the property was a non-resident and absent, that an order of publication in the usual form be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated [*276] a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial, "to show cause why condemnation should not be decreed, and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March, 1864, the district attorney moved that the claim and answer and the appearance of the respondent by counsel be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the sixteenth day of the following April. At the sale under this writ the grantor of the defendant became the purchaser.

The question for determination is, whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded. [*277]

There were several libels of information filed against the property of the plaintiff at the same time with the one here mentioned. They were identical in their allegations, except as to the property seized, and the same motion to strike from the files the appearance, claim, and answer of the respondent was made in each case, and on the same day, and similar orders were entered and like decrees of condemnation. One of these was brought here, and is reported in the 11th of Wallace. In delivering the unanimous opinion of this court, upon reversing the decree in the case, and referring to the order striking out the claim and answer, Mr. Justice Swayne said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 267.

The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of

being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to [*278] deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical [*279] seizure did not of itself establish the allegations of the libel, and

could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

These views find corroboration in the opinion of Mr. Justice Story, in the case of *Bradstreet v. Neptune Insurance Co.*, 3 Sumn. 600, Fed. Cas. No. 1,793. In that case, the action was upon a policy of insurance upon a vessel, the declaration alleging its loss by seizure of the Mexican government. The defendants admitted the seizure, but averred that it was made and that the vessel was condemned for violation of the revenue laws of Mexico, and to prove the averment produced a transcript of the record of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. Among the questions considered by the court was the effect of that record as proof of the laws of Mexico, and of the jurisdiction of the court and the cause of seizure and condemnation. After stating that the sentence of a foreign court of admiralty and prize *in rem* was in general conclusive, not only in respect to the parties in interest, but [*280] also for collateral purposes in collateral suits, as to the direct matter of title and property in judgment, and as to the facts on which the tribunal professed to proceed, Mr. Justice Story said, that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a muni-

cipal court upon a seizure or other proceeding *in rem*; that in each the sentence was conclusive as to the title and property, and, it seemed to him, was equally conclusive as to the facts on which the sentence professed to be founded. But the learned judge added, that it was an essential ingredient in every case, when such effect was sought to be given to the sentence, that there should have been proper judicial proceedings upon which to found the decree; that is, that there should have been some certain written allegations of the offence, or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, might know what the offence was with which they were charged, and might have an opportunity to defend themselves, and to disprove the same. "It is a rule," said the learned judge, "founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party,—*castigatque, auditque*. It may be binding upon the subjects of that particular nation. But, upon the [*281] eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding."

In another part of the same opinion the judge characterized such sentences "as mere mockeries, and as in no just sense judicial proceedings"; and declared that they "ought to be deemed, both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds."

This language, it is true, is used with respect to proceedings

in rem of a foreign court, but it is equally applicable and pertinent to proceedings *in rem* of a domestic court, when they are taken without any monition or public notice to the parties. In *Woodruff v. Taylor*, 20 Vt. 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed, that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

In the proceedings before the district court in the confiscation case, monition and notice, as already stated, were issued and published; but the appearance of the owner, for which they called, having been refused, the subsequent sentence of [*282] confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. His position with reference to subsequent proceeding was then not unlike that of a party in a personal action, after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld.

The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular

modes of administering relief, such as legal or equitable: or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton v. Meader*, 4 Sawyer 603, Fed. Cas. No. 10,351. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice [*283] Miller, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow v. Forrest*, 9 id. 339, 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of the court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornett v. Williams*, 20 Wallace 226, is more accurate. "The jurisdiction," says the justice, "having attached in the case, every thing done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." 20 Wall. 250.

It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction [*284] is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

Judgment affirmed.

MILLER, BRADLEY and HUNT, JJ., dissented.

THE RECORD OF THE JUDGMENT

AMENDING THE RECORD.

BALCH & WIFE v. SHAW, in Mass. Sup. Jud. Ct., March Term, 1851
—61 Mass. (7 Cush.) 282.

Writ of entry, dated Aug. 25, 1849, by Benjamin L. Balch and wife in this court against Robt. G. Shaw. Case reserved.

Demandants claimed in right of the wife as heir of John Tilley. The tenant relied on a record of the court of common pleas showing a sale to him by the executors of Tilley by order of that court, at the October term, 1824. Demandants objected to the record because it was not made up and entered at large till 1838; and then without sufficient record to make it up from, without notice, on the petition of an improper person, that the clerk had no power to make up the record then, and that the record as made up was not true.

FLETCHER, J. This is a writ of entry. The demandants claim in right of the wife as heir of John Tilley. The tenant claims under a sale by the executors of John Tilley, by virtue of a license of the court of common pleas. To make out his title, the tenant produced a record of the court of common pleas. The case turns, therefore, upon the question whether the record was rightfully amended, so that the tenant can maintain his title on that record.

There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*. The length of time in this case, between granting the license and making up the record, does not take away the right or jurisdiction of the court. The authorities upon this point are numerous and conclusive. This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record; in such case, the defect is not in the record, but in the action of the court.

It was further said in argument, that there was not sufficient material from which to make up the record. But the court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive, until altered or set aside by the same or some other court having jurisdiction, but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title.

It was further said, that the extended record was invalid, because made without notice. But this was not a case for [*285] notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party, who supposes he can show such cause, should apply to the court to have the record set aside or expunged, after it is made.

Then as to the objection that the record was extended upon the application of Vinal, who was not interested in the premises demanded in this suit; if he had an interest in the demanded premises, or if he had no interest, it would not be material. The court might amend their records upon their own motion, or upon the motion or suggestion of any one interested. It is not a proceeding in which there need be any parties. It is the act of the court itself, correcting its own records, to make them conform to the truth of the case.

These general views will render it unnecessary to consider particularly some other ingenious arguments which were offered by the counsel for the demandant. The court being of opinion that there was a sufficient record of the order of the court of common pleas to sell the premises conveyed to Jones, there must be

Judgment for the tenant.

CONCLUSIVENESS OF THE RECORD.

GLANVILLE, Liber 8, cc. 8 & 9—A. D. 1180?

The justices being present in court and perfectly concurring as to the record, it necessarily follows, that their record must be abided by, neither party being allowed to deny it, as we have already observed. But if the justices entertain any doubt upon the

subject and it cannot be ascertained, then the plea must be again commenced and proceeded on in court. (c. 9.) It should be understood that no court generally speaking, has a record except the king's court: for in other courts, if a man should say a thing which he would afterwards retract, he may deny it against the whole court by the oath of three witnesses, affirming that he had not said the thing imputed to him, or, indeed, by a greater or less number of witnesses, according to the custom of the different courts.

MICHELS v. STORK, in Mich. Sup. Ct., Dec. 21, 1883—52 Mich. 260, 17 N. W., 833.

Trover by Henry Stork against Jacob Michels in the Superior Court of Detroit. From judgment for plaintiff defendant brings error.

COOLEY, J. The only question important to the decision of this case is, whether an officer's return of service of process is conclusive upon the parties to the suit in which the process issued, when brought in question in some collateral suit or proceeding.

Michels, it appears, on August 10, 1874, procured an attachment from a justice of the peace against the chattels of Stork, and put it into the hands of constable John Gnau for service. The constable made return that by virtue of the writ he did, on the 10th day of August, 1874, seize the goods and chattels of the defendant mentioned in the inventory annexed thereto, and that on the 12th day of August, 1874, he served upon the defendant a copy of the writ and inventory, duly certified by him, by leaving the same at his usual place of abode with his wife, a person of [*261] suitable age and discretion, whom he informed of its contents. What further was done in the attachment suit does not appear.

The present action is trover for the conversion of the property which the constable returned that he had attached. The plaintiff claims that the constable did not attach the goods at all, but that the officer and the defendant together took them away, and that they were immediately left by the officer with the defendant, and plaintiff never saw them afterwards. * * *

The question in this court arises upon the following instructions of the trial judge: * * * [*262] * * * "Now, you are to determine whether Mr. Gnau did really levy an attachment on that property or not. If he did, that ends the suits. You are to determine, in the second place, if he did not levy an attachment,

whether he and Michels went there to get the goods into Michel's possession simply for that purpose, and not for the purpose of levying the attachment. If Michels thought that Gnau had attached the goods and Gnau had the proper papers to attach them—and for the purposes of this case I charge you that he did have—then Michels would not be responsible; that is, if he was acting in good faith in the transaction. You see the question is a very simple one. It all turns on whether Michels and Gnau went there for the purpose of levying that attachment or whether they went there for the purpose of giving Michels possession of those goods, without any regard to the attachment. I charge, as a matter of law, it makes no difference what the officer returned, so far as Michels was concerned." * * *

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The purport of this instruction is, that the return is to be as *prima facie* evidence of the facts stated in it, [*263] but it may be contradicted by parol evidence, and if the jury are convinced by such evidence that the return is untrue, they are at liberty to disregard it. And the jury in this case did disregard it, and gave judgment for the plaintiff, grounding their action upon a finding that no attachment had in fact ever been made.

Had the suit been brought against the officer for a false return, it is conceded that the plaintiff would have been at liberty to show the falsity of the return by any evidence fairly tending to show it. He might do this also by affidavit on a motion in the same suit to set aside the return; and this is not an uncommon proceeding when the truth of the return is disputed. *Chapman v. Cumming*, 17 N. J. L. 11; *Carr v. Commercial Bank*, 16 Wis. 50; *Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466. It has also been held that the officer's return may be contradicted in equity in a proceeding instituted to set aside a judgment founded upon it. *Owens v. Ranstead*, 22 Ill. 161; *Newcomb v. Dewey*, 27 Iowa 381; *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556; *Bell v. Williams*, 38 Tenn. (1 Head) 229; *Ridgeway v. Bank of Tennessee*, 30 Tenn. (11 Humph.) 523. See *Fowler v. Lee*, 10 G. & J. (Md.) 358, 32 Am. Dec. 172; *Leftwick v. Hamilton*, 9 Heisk. 310. It is also held that the officer's return is not conclusive as to facts stated therein which he must learn by inquiry of others; as, for example, that the person upon whom the process was served was the incumbent of a certain corporate office, such as that of president of a bank. *St. John v. Tombeckee Bank*, 3 Stew. (Ala.) 146; *Rowe v. Table & Co.*, 10 Cal. 441; *Wilson v.*

Spring &c. Co., 10 Cal. 445. See *Chapman v. Cumming*, 17 N. J. L. 11; *Sanford v. Nichols*, 14 Conn. 324; and compare *State v. O'Neill*, 4 Mo. App. 221. And a person not a party or privy to the proceeding in which the return is made, is never concluded by it from showing the real fact. *Nall v. Granger*, 8 Mich. 450. And where suit is brought upon a foreign judgment, it seems to be competent to disprove jurisdiction by showing, in contradiction of the officer's return, that no service was made upon the party defendant. [*264] *Knowles v. Gaslight &c. Co.* 86 U. S. (19 Wall.) 58; *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457; *Carlton v. Bickford*, 79 Mass. (13 Gray) 591; *McDermott v. Clary*, 107 Mass. 501; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Bowler v. Huston*, 30 Grat. (Va.) 266, 32 Am. Rep. 673; *Lowe v. Lowe*, 40 Iowa 220.

None of these cases are analogous to the one before us; but it must be conceded that there are cases which are directly in point, and which tend to support the instructions. *Cunningham v. Mitchell*, (Va.) 4 Rand. 189; *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Hutchins v. Johnson*, 12 Conn. 376; *Smith v. Law*, 27 N. Car. (5 Ired. L.) 197; *Joyner v. Miller*, 55 Miss. 208; *Abell v. Simon*, 49 Md. 318; *Gary v. State*, 11 Tex. App. 527; *Dasher v. Dasher*, 47 Ga. 320; *Elder v. Cozart*, 59 Ga. 199; *Jones v. Commercial Bank*, 6 Miss. (5 How.) 43, 35 Am. Dec. 419. The Georgia cases appear to be based upon a statute. If it were important now to examine the other cases critically, some of them might perhaps be distinguished, but their tendency is unquestionably as above stated.

On the other hand, the ruling of this court in *Green v. Kindy*, 43 Mich. 279, is distinctly adverse to the instructions. It was there held that the return of a sheriff to a writ of replevin, in which he certified that the plaintiff in the suit had not filed a forthcoming bond, was conclusive upon the parties, and would preclude any such bond being set up. This case, which seems to have been overlooked on the trial, is in entire accord with the English authorities. *Anonymous*, Loft 372; *Bentley v. Hore*, 1 Lev. 86; *Flud v. Pennington*, Cro. Eliz. 872; *Rex v. Elkins*, 4 Burr. 2129; *Harrington v. Taylor*, 15 East 378; *Goubot v. De Crouy*, 2 Dowl. P. C. 86. But it is also in accord with the great preponderance of authority in this country. In New York the doctrine was strongly asserted in a case in which a constable had served his own process, which the law of that state allowed. "The constable's return," says the court, "is conclusive against the de-

defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in [*265] abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return." See *Allen v. Martin*, 10 Wend. 300; *Boomer v. Laine*, 10 Wend. 525. In Pennsylvania it was said in an early case: "It is a well-settled principle, applicable to every case, that credence is to be given to the sheriff's return; so much so, that there can be no averment against it in the same action. A party may make an averment consistent with the sheriff's return, or explanatory of its legal bearing and effect, where the return is at large; but he cannot aver a matter directly at variance with the facts stated in return, and contradictory to it, and showing it to be false. If a party be injured by the false return of the sheriff, his remedy is by action on the case against the sheriff who makes it." *Knowles v. Lord*, 4 Whart. 500; s. c. 34 Am. Dec. 525. Like decisions were made in *Zion Church v. St. Peter's*, 5 W. & S. 215; *Diller v. Roberts*, 13 S. & R. 60; and the doctrine is recognized in *Parson's Appeal*, 49 Penn. St. 195. It has also been distinctly and strongly affirmed in Massachusetts cases. *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnell*, 11 Mass. 163; *Winchell v. Stiles*, 15 Mass. 230; *Beam v. Parker*, 17 Mass. 591; *Campbell v. Webster*, 81 Mass. (15 Gray) 28; *Dooley v. Wolcott*, 86 Mass. (4 Allen) 406. In New Hampshire it is said: "As between the parties, the return of the sheriff is conclusive upon all matters material to be returned; and cannot be contradicted by such parties or their privies, or by bail, endorsers, or others, whose rights or liabilities are dependent upon the suit. The remedy for a false return is by suit against the sheriff, and not by defeating the proceedings in which such return is made." *Bolles v. Bowen*, 45 N. H. 124, following *Brown v. Davis*, 9 N. H. 76; *Wendell v. Mugridge*, 19 N. H. 109; *Angier v. Ash*, 26 N. H. 99; *Messer v. Bailey*, 31 N. H. 9; *Clough v. Monroe*, 34 N. H. 381. To the same purport are the Kentucky cases. *Trigg v. Lewis's Ex'rs.*, 13 Ky. (3 Litt.) 129; *Smith v. Hornback*, 10 Ky. (3 A. K. Marsh.) 379. In Vermont and Maine the cases in Massachusetts have been followed with approval. *Eastman v. Curtis*, 4 Vt. 616; *Swift v. Cobb*, 10 Vt. 282; [*266] *Wood v. Doane*, 20 Vt. 612; *Stratton v. Lyons*, 53 Vt. 130; *Gilson v. Parkhurst*, 53 Vt. 384; *Stinson v. Snow*, 10 Me. 263; *Fairfield v. Painc*, 23 Me. 498, 41 Am. Dec. 357. The decisions in Indiana are to the same effect. *Rowell v. Klein*, 44 Ind. 290; *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574; *Clark v. Shaw*, 79 Ind. 164. So are those in North Carolina, Arkansas, Minnesota, and Ne-

braska. *Hunter v. Kirk*, 11 N. Car. (4 Hawks) 277; *Rose v. Ford*, 2 Ark. 26; *Tullis v. Brawley*, 3 Minn. 277, Gil. 195; *Johnson v. Jones*, 2 Neb. 126. In Illinois the English rule has been recognized: *Fitzgerald v. Kimball*, 86 Ill. 396; though it is said some exceptions are made to it in the furtherance of justice in that state. *Ryan v. Lander*, 89 Ill. 554. What the exceptions are is not pointed out in that case; but in the subsequent case of *Hunter v. Stoneburner*, 92 Ill. 75, 79, we have the following statement as the result of prior decisions: "It is in rare cases only, that the return of the officer can be contradicted, except in a direct proceeding by suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive. An exception to the rule is, where some other portion of the record in the same case contradicts the return, but it cannot be done by evidence dehors the record."

These citations are sufficient, and more than sufficient, to justify the previous ruling by this court. It follows that the instruction complained of was erroneous, and it must be reversed with costs and a new trial ordered.

Graves, C.J., and *Sherwood, J.*, concurred.

Campbell, J., dissenting. As I understand the controversy in this case, the dispute was not whether the constable took the property, but whether the taking was not by process designed by the parties as a mere pretext for getting possession, and not for any legitimate purpose. The case is one of abuse of process for illegal purposes, in which it was claimed, and the jury must have found, that Michels was active throughout as connected with the constable. I do not [*267] understand that a fraudulent use of process to get possession of property, and for no other purpose is, under any circumstances, a justification to any person concerned in the fraud. I think the court committed no error, and that the judgment should be affirmed.

FERGUSON v. CRAWFORD, in N. Y. Ct. of App., 1877—70 N. Y. 253, 26 Am. Rep. 589.

Foreclosure proceeding by Orson J. Ferguson against Stephen H. Crawford and others. From a judgment of the general term affirming a judgment in favor of defendants entered on trial at the special term plaintiff appeals.

RAPALLO, J. This action was brought to foreclose a mortgage, held by the plaintiff, on certain real estate in the county of Westchester. One of the defences was, that the rights of the

plaintiff, as mortgagee, had been barred by a judgment of foreclosure of a mortgage prior to his, in favor of one McFarquahar, covering the same premises, under which judgment the premises had been sold to the defendant [*255] Horton. It was alleged in the answer that the plaintiff was a defendant in the McFarquahar action, in which the judgment had been rendered, and appeared therein, by John W. Mills, as his attorney, but did not put in any answer.

On the trial of the present action, the defendants, in support of this defense, put in evidence the judgment-roll in the last-mentioned action, which roll contained a notice of appearance for the present plaintiff, and a consent that judgment be entered, purporting to be signed by Mills. The judgment was entered by default for want of an answer, and on this consent, and recited that the summons had been served on the defendants therein, and that none of them had appeared, except the present plaintiff, by John W. Mills, his attorney, and some others named in the judgment.

Thereupon the plaintiff called Mills as a witness, and offered to prove by him, 1st. That the signature to the notice of appearance and consent was a forgery; 2d. That Mills was never authorized to appear for the plaintiff; and 3d. That he never did appear for him.

No proof of service of the summons on the plaintiff is attached to or contained in that judgment-roll, and it appears to be conceded on the present argument, as matter of fact, that no such service was made. The defendants rely wholly upon the effect of the recital in the judgment and the notice of appearance contained in the judgment-roll, and claim that in a collateral action these import absolute verity and cannot be contradicted by extrinsic evidence.

They also claim that the case of *Brown v. Nichols*, 42 N. Y. 26, is decisive of this case. There a judgment had been recovered against a defendant who had not been served with process, but for whom an attorney had appeared without authority, and it was held by this court that the judgment could not be attacked on that ground for want of jurisdiction in a collateral proceeding.

That decision does not reach the present case. It is not founded upon any doctrine which precludes a party from showing, as matter of fact, that he was never brought before [*256] the court, or appeared in it, but is based upon a long line of authority, which holds that when an attorney of the court appears for a party his appearance is recognized and his authority will be presumed

to the extent, at least, of giving validity to the proceeding. That he is an officer of the court, amenable to it for misconduct, and to any party for whom he assumes to act without authority, for all damages occasioned by such action, and for reasons of public policy the court holds the appearance good, leaving the aggrieved party to his action for damages against the attorney, granting relief against the judgment, only in a direct application, and in case the attorney is shown to be irresponsible. *Denton v. Noyes*, 6 Johns. 296. This, however, is an entirely different case. The offer was not merely to show that the attorney was not authorized to appear, but that he did not in fact appear, and that the pretended appearance was a forgery.

None of the principles upon which the decisions in *Denton v. Noyes*, and *Brown v. Nichols* rest, can be applied to such a case. There is no act of any officer of the court which public policy requires should be recognized. There is no party against whom the innocent defendant can have redress. He is sought to be held bound by a judgment when he was never personally summoned or had notice of the proceeding, which result has been frequently declared to be contrary to the first principles of justice, and this is sought to be accomplished by means of a judgment entered upon forged papers. No principle of public policy requires or sanctions sustaining such a judgment. The only difficulty in the case arises upon the objection that the evidence offered tends to contradict the record, and from the adjudications [?] which attach to the judgment of a court of general jurisdiction, a conclusive presumption of jurisdiction over the parties, which cannot be contradicted except by matter appearing on the face of the record itself.

It is an elementary principle recognized in all the cases that, to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that [*257] the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set up against a judgment when sought to be enforced, or any benefit is claimed under it. There is no difference of opinion as to this general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action: Whether, when the record is silent as to the steps taken to bring the parties into court, it may be proved by evidence that they were not legally summoned and did not appear; or whether, when the record recites that they were summoned or

appeared, such recitals may be contradicted by extrinsic evidence; or whether the jurisdiction over the person and subject-matter is a presumption of law, which cannot be contradicted, unless it appears on the face of the record itself that there was a want of such jurisdiction, as in cases where the record shows that the service of process was by publication or some other method than personal.

On these points there has been as much diversity of opinion, especially between the courts of this state and those of other states, as upon any general question which can be mentioned, although there has as yet been no authoritative adjudication in this state on the subject. It is well settled by our own decisions, that in the case of a judgment of a court of general jurisdiction of a sister state, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown by extrinsic evidence, and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact, is not conclusive, but may be contradicted by extrinsic evidence. *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30. [*258]

And the same rule prevails in some of the other states in regard to the judgments of courts of sister states. Although some have held, even in regard to such a judgment, that if the record contains recitals showing jurisdiction, they cannot be contradicted. *Field v. Gibbs*, 1 Peters C. C. R., [Fed. Cas. No. 4,766]; *Roberts v. Caldwell*, 35 Ky. (5 Dana) 512; *Ewer v. Coffin*, 55 Mass. (1 Cush.) 23; *Rathbone v. Terry*, 1 R. I. 73; *Shelton v. Tiffin*, 6 How. (U. S.) 163, 186.

After considerable research, I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states, holding that in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service

of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice.

In *Cook v. Darling*, 18 Pick. 393, in an action of debt on a domestic judgment, the defendant pleaded that, at the time of the supposed service upon him of the writ in the original action, he was not an inhabitant of the state of Massachusetts; that he had no notice of the action, and did not appear therein.

This plea was held bad on demurrer, on the ground that the judgment could not be impeached collaterally. In *Granger v. Clarke*, 22 Maine 128, also an action on a judgment, the plea was the same, with the addition that the judgment had been obtained by fraud; but it was held to constitute no defense. *Coit v. Haven*, 30 Conn. 190, was a *scire facias* on a judgment, and the defendant pleaded that the writ in the original action was never served upon him, etc.; and the [*259] court held, in an elaborate opinion, that a judgment of a domestic court of general jurisdiction could not be attacked collaterally, unless the want of jurisdiction appeared upon the face of the record, and that jurisdictional facts, such as the service of the writ and the like, were conclusively presumed in favor of such a judgment, unless the record showed the contrary, although this rule did not apply to foreign judgments, or judgments of the courts of sister states, or to domestic judgments of inferior courts, and that the only remedy in such a case was by writ of error or application to a court of equity.

The same rule is held in *Penobscot R. R. Co. v. Weeks*, 52 Maine 456; *Wingate v. Haywood*, 40 N. H. 437; *Clark v. Bryan*, 16 Md. 171; *Callen v. Ellison*, 13 Ohio St. 446; *Horner v. Doe*, 1 Ind. 131; *Wright v. Marsh*, 2 G. Greene (Iowa) 94; *Prince v. Griffin*, 16 Iowa 552, and in numerous other cases which are referred to in the case of *Hahn v. Kelly*, 34 Cal 391, which adopts the same rule and contains a full and instructive discussion of the question.

There are many cases in other states, and in the courts of the United States, containing expressions general in their character, which would seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, and they are sometimes cited as authorities to that effect. *Elliott v. Piersol*, 26 U. S. (1 Peters) 328, 340; *Hollingsworth v. Barbour*, 29 U. S. (4 Peters) 466; *Hickey v. Stewart*, 44 U. S. (3 How.) 750; *Shriver v. Lynn*, 43 U. S. (2 How.) 43; *Williamson v. Berry*, 49 U. S. (8 How.) 495; *same v. Ball*, *same* 566; *Enos v. Smith*, 15 Miss. (7 Sm. & M.) 85; *Camp-*

bell v. Brown, 7 Miss. (6 How.) 106; *Shaefer v. Gates*, 41 Ky. (2 B. Mon.) 453; *Wilcox v. Jackson*, 38 U. S. (13 Peters) 498; *Miller v. Ewing*, 16 Miss. (8 Sm. & M.) 421, and numerous other cases not cited. But an examination of these cases discloses that they all relate either to judgments of inferior courts, or courts of limited jurisdiction, or courts of general jurisdiction acting in the exercise of special statutory powers, which proceedings stand on the [*260] same footing with those of courts of limited and inferior jurisdiction (3 N. Y. 511), or courts of sister states, or to cases where the want of jurisdiction appeared on the face of the record, or to cases of direct proceedings to reverse or set aside the judgment. I have not found one which adjudicated the point now under consideration, otherwise than those to which I have referred. There are some cases which hold that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, but those are placed expressly on the ground that such evidence does not contradict the record. *Bodurtha v. Goodrich*, 69 Mass. (3 Gray) 508; *Shelton v. Tiffin*, 47 U. S. (6 How.) 163, 186; *Harris v. Hardeman*, 55 U. S. (14 How.) 334, 340. Those cases are, however, in conflict with the decision of this court, in *Brown v. Nichols*, 42 N. Y. 26, and in many other cases.

The learned annotators of Smith's Leading Cases, Hare & Wallace, 1 Smith L. Cases, vol. 1, p. 842 (marg.) sum the matter up by saying: "Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive and cannot be disproved by extrinsic evidence."

It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are directly opposed to it.

As has been already stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, [*261] and have further decided (in opposition to the holding of courts of some of the other

states) that this may be done, even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case, *Kerr v. Kerr*, 41 N. Y. 272, have in their opinions made no discrimination between them. *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Noyes v. Butler*, 6 Barb. 613, and cases cited.

When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provision of the constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there it is equally conclusive in all the states of the union; and whatever pleas would be good to a suit thereon in the state where rendered, none others can be pleaded in any court in the United States. *Hampton v. McConnel*, 16 U. S. (3 Wheaton) 234; *Story Com. on Cons.*, § 183; *Mills v. Duryee*, 11 U. S. (7 Cranch) 481.

In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this state and the common law, and, consequently, that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the union between the effect of domestic judgments and judgments [*262] of sister states, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained, by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the

proceeding. This explanation, however, does not remove the difficulty in making the distinction, for if there is a conclusive presumption that there was jurisdiction, that presumption must exist in one case as well as in the other. The question whether or not the party is estopped, cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another.

But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments. The reasons are fully stated in the case of *Starbuck v. Murray*, 5 Wend. 148. In that case, which was an action upon a Massachusetts judgment, the defendant pleaded that no process was served on him in the suit in which the judgment sued on was rendered, and that he never appeared therein in person or by attorney, and this plea was held good, notwithstanding that the record of the judgment stated that the defendant appeared to the suit. Marcy, J., in delivering the opinion of the court, and referring to the argument that the defendant was estopped from asserting anything against the allegation of his appearance contained in the record, says: "It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not [*263] in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced, as to him, is no record. But if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiff in effect declares to the defendant—the paper declared on, is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact." And again, at p. 160, he says: "To say that the defendant may show the supposed record to be a nullity, by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so because the court has inserted in the record an allegation which he offers to prove untrue, does not seem to me to be very consistent."

This is but an amplification of what is sometimes more briefly expressed in the books, that where the defense goes to defeat the record, there is no estoppel. That the reasoning of Marcy, J., is applicable to domestic judgments, is also the opinion of the learned annotators to Phillip's Evidence. (Cowen & Hill's notes, 1st ed., p. 801, note 551.) Referring to the opinion of Marcy, J., before cited, they say: "The same may be said respecting any judgment, sentence or decree. A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case." The dicta of our judges are all to the same effect, although the precise case does not seem to have arisen. In *Bigelow v. Stearns*, 19 Johns. 39, 41, Spencer, Ch. J., laid down the broad rule that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained [*264] jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. In *Latham v. Edgerton*, 9 Cow. 227, Sutherland, J., in regard to a judgment of a court of common pleas, says: "The principle that a record cannot be impeached by pleading, is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced or where any benefit is claimed under it." Citing *Mills v. Martin*, 19 Johns. 7, 33. He also says (p. 229): "The plaintiff below might have applied to the court to set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment was set up against him, and then to show that the proceedings were void for want of jurisdiction." In *Davis v. Packard*, 6 Wend. 327, 332, in the court of errors, the chancellor, speaking of domestic judgments, says: "If the jurisdiction of the court is general or unlimited both as to parties and subject-matter, it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case." In *Bloom v. Burdick*, 1 Hill 130, Bronson, J., says: "The distinction between superior and inferior courts is of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered;" and in *People v. Cassels*, 5 Hill 164, 168, the same learned judge makes the remark, that no court

or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. In *Harrington v. The People*, 6 Barb. 607, 610, Paige, J., expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in *Noyes v. Butler*, 6 Barb. 613, 617, and in *Hard v. Shipman*, [*265] 6 Barb. 621, 623, 624, where he says of superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record. Citing *Starbuck v. Murray*, 5 Wend. 158. The language of Gridley, J., in *Wright v. Douglass*, 10 Barb. 97, 111, is still more in point. He observes: "It is denied by counsel for the plaintiff, that want of jurisdiction can be shown collaterally to defeat a judgment of a court of general jurisdiction. The true rule, however, is that laid down in the opinion just cited (op. of Bronson, J., in *Bloom v. Burdick*, 1 Hill 138, to 143), that in a court of general jurisdiction, it is to be presumed that the court has jurisdiction till the contrary appears, but the want of jurisdiction may always be shown by evidence, except in one solitary case," viz: "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding."

The general term, in that case, held that a judgment of the supreme court was void for want of service of an attachment, notwithstanding that the record averred that the attachment had been duly served and returned, according to law. The judgment in the case cited was reversed (7 N. Y. 564), but not upon the point referred to here. It cannot, however, be held to be an adjudication upon that point, because the judgment was not rendered in the exercise of the general powers of the court, but in pursuance of a special statutory authority.

In the *Chemung Canal Bank v. Judson*, 8 N. Y. 254, the general principle is recognized, that the jurisdiction of any court exercising authority over a subject may be inquired into, and in *Adams v. The Saratoga & Washington R. R. Co.* [*266], 10 N. Y. 328, 333, Gridley, J., maintains as to the judgments of all courts, that

jurisdiction may be inquired into, and disproved by evidence, notwithstanding recitals in the record, and says that such is the doctrine of the courts of this state, although it may be different in some of the other states, and perhaps also in England; and he says the idea is not to be tolerated, that the attorney could make up a record or decree, reciting that due notice was given to the defendant of a proceeding, when he never heard of it, and the decree held conclusive against an offer to show this vital allegation false. That was a case of special proceeding, and, therefore, not an authority on the point. In *Pendleton v. Weed*, 17 N. Y. 72, 75, where a judgment of the supreme court was sought to be attacked collaterally, it is said by Strong, J.: "It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, *and that such jurisdiction is open for inquiry,*" and by Comstock, J., at p. 77: "I assent to the doctrine that where there is no suit or process, appearance or confession, no valid judgment can be rendered in any court; that in such a case *the recital in the record of jurisdictional facts is not conclusive.*" Citing *Starbuck v. Murray*. "I think it is always the right of a party against whom a record is set up, to show that no jurisdiction of his person was acquired, and consequently that there was no right or authority to make up the record against him." Selden and Pratt, JJ., concurred in these views, but the case was disposed of on a different point.

In *Porter v. Bronson*, 29 How. Pr. 292, 19 Abb. Pr. 236, the court of common pleas of the city of New York held, at general term, that assuming the marine court to be a court of record, a defendant in an action on a judgment of that court might set up that he was not served with process and did not appear, notwithstanding recitals in the record showing jurisdiction: and in *Bolton v. Jacks*, 6 Rob. 166, 198, Jones, J., says that it is now conceded, at least in this state, that want of jurisdiction will render void [*267] the judgment of any court, whether it be of superior or inferior, of general, limited or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered, is not by the bare fact of such recitals estopped from showing, by affirmative proof, that they were untrue and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion, several of the cases

which I have referred to, and *Dobson v. Pearce*, 12 N. Y. 156, and *Hatcher v. Rocheleau*, 18 N. Y. 86, 92.

It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. 198, and if adopted here, is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained, it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity.

The technical difficulty arising from the conclusiveness of the record is thus obviated. In the present case, the judgment is set up by the defendants as a bar to the plaintiff's action. But it must be borne in mind, that this is an equitable action, being for the foreclosure of a mortgage. The [*268] defendants set up the foreclosure in the McFarquahar case as a bar, but being in a court of equity, the plaintiff had a right to set up any matter showing that the defendants ought not in equity to avail themselves of that judgment. They offered to show that it was entered *ex parte* on forged papers. It does not appear that the plaintiff ever had any knowledge of it, and it is not pretended that he was legally summoned. Such a judgment would never be upheld in equity, even in favor of one ignorant of the fraud and claiming *bona fide* under it. He stands in no better position than any other party claiming *bona fide* under a forged instrument.

The case is analogous in principle to that of the *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556. That was a bill filed by a second mortgagee to redeem mortgaged premises from a first mortgagee. The first mortgagee had obtained a decree of foreclosure against the second mortgagee, and the time limited for redemption had expired. The record of the decree found the fact that legal service of the bill in the first suit had been made on the second mortgagee, but in fact none had been made, and he had no

actual knowledge of the pendency of the suit until after the time limited for redemption had expired; and he would have redeemed if he had known of the decree.

It was held, 1. That the decree was not in any proper sense a bar to the present suit, as a judgment at law would be a bar to a suit at law; but that, without impugning the decree, the court could, for equitable reasons shown, allow a further time for redemption.

2. That, therefore, the question whether the plaintiff could contradict the record by showing that no service of the bill was, in fact, made upon him, did not present itself as a technical one, to be determined by the rules with regard to the verity of judicial records, but only in its relation to the plaintiff's rights to equitable relief, and therefore that evidence of want of notice was admissible.

The bill to redeem was not framed to open the former [*269] decree, and contained no allegations adapted to or praying for such relief, but was in the ordinary form of a bill for redemption, taking no notice of the previous decree. The decree was set up in the answer, and it was averred that it was rendered on legal notice to the plaintiff. The court, however, held that this defense might be rebutted by evidence of facts which should preclude defendants from taking advantage of a decree of which they could not conscientiously avail themselves.

Under the system of practice in this state, no reply to an answer setting up new matter is required, but the plaintiff is allowed to rebut it by evidence. Neither is it necessary to anticipate a defense arising upon a deed or record by inserting matter in the complaint in avoidance of it. The defense may never be set up, and the plaintiff is not bound to suppose that it will be. The state of the pleadings, therefore, presents no difficulty. The only question which might be raised is, that McFarquahar, in whose name the decree was obtained, should be before the court, but no such objection was made at the trial, and if it had been, I do not see that the decree and sale are parties to this action, and I see no reason why the validity of the McFarquahar foreclosure cannot be tried herein as well as upon a motion or in a separate suit to set aside the decree.

The judgments should be reversed, and a new trial ordered with costs to abide the event.

All concur; *Andrews, J.*, in result.

Judgment reversed.

VACATING, AMENDING, AND MODIFY- ING THE JUDGMENT

BRONSON v. SCHULTEN, in U. S. Sup. Ct. 1881—104 U. S.
(14 Otto) 410.

Motion dated Dec. 27, 1876, in the circuit court for the southern district of New York, by J. W. Schulten et al., to vacate a judgment entered against Greene C. Bronson Aug. 5, 1860, for money paid under protest to him, as United States revenue collector for the port of New York, by the plaintiffs. From an order granting the motion of Lucretia Bronson as executrix of G. C. Bronson brings error.

MILLER, J. * * * [*413] It appears that the original suit was commenced in one of the state courts, Sept. 2, 1858, and afterwards removed into the circuit court of the United States, where plaintiffs filed a declaration containing the common counts. It appears that they also served a bill of particulars, setting out seventy-four entries of goods at the custom house, on which they had been charged excessive duties by the defendant Bronson, which they had paid under protest. The affidavit of Murray, a refund clerk in the custom-house, states that in thirty-four of these entries the sums which should have been allowed plaintiffs were omitted in the adjustment. * * * [*414]

We have thus a case in which plaintiffs sue for excessive charges on account of these commissions paid on seventy-four entries of goods, specifically set out in their bill of particulars. A verdict is rendered in their favor fixing the precise error under which the excessive duty had been exacted, and leaving to a referee to ascertain the amount due on each of these entries. The referee reports as to all but thirty-four, nearly half, of these entries, and as to them makes no report. A judgment is rendered in conformity to the report, the money paid and accepted, and seventeen years afterwards the judgment is opened to correct the omission of these thirty-four entries.

We are of opinion that, if there was any mistake in the report of the referee and in the judgment rendered thereon, it was so clearly due to the negligence and inattention of plaintiffs or their attorney, that no case is made for relief in any of the modes known

to the law, of correcting an erroneous judgment after the term at which it was rendered.

Stress is laid upon the fact in argument that the referee was one of the clerks in the custom-house, who had access to all the books and papers of the office. It is probable he was selected by both parties because of his familiarity with those accounts, but he is not mentioned in the order of reference as such clerk or officer. Any other person so appointed would have been permitted to examine the necessary books and papers, and in this matter he must be held to be, as no doubt he was, an impartial referee, representing neither the collector nor the government which was to pay the sum found due.

The plaintiffs had the same right to appear before him, examine his report and the evidence on which it was founded, to take and urge to the court exceptions to it, as in case of any other reference. Nothing of the kind was done, and though it is here said that no report at all was made as to thirty-four out of seventy-four entries set out in plaintiff's bill of particulars, no exception was made to the report on that ground, nor any inquiry made as to the reason for such omission. It is [*415] obvious that if this had been done, the error which is now complained of would have been corrected before the report of the referee was confirmed and judgment rendered on it.

If, then, there was no question of lapse of time, or of the power of the court over its own judgments after the term at which they are rendered, and if this were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could be granted, because of the negligence, carelessness, and inattention and laches of the plaintiffs, or of their attorney, in the matter. Does the power of the court over its own judgment, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. Railroad Company*, 102 U. S. 107; *Public Schools v. Walker*, [*416]9 Wall. 603; *Brown v. Aspden*, 14 How. 25; *Cameron v. McRoberts*, 3 Wheat. 591; *Sibbald v. United States*, 12 Pet. 480; *United States v. The Brig Glamorgan*, 2 Curtis, C. C. 236; *Bradford v. Patterson*, 8 Ky. (1 A. K. Marsh.) 464; *Ballard v. Davis*, 26 Ky. (3 J. J. Marsh.) 656.

But to this general rule an exception has crept into practice in a large number of the state courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through the default of the clerk. See Archbold's Practice.

In Rolle's Abridgement, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court.

In *Picket's Heirs v. Legerwood*, 7 Pet. 144, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in the British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the

exercise of this writ of error *coram vobis* found in the reported cases of this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case.

There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-fashioned [*417] writ of error *coram vobis* did. This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the states where a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do.

It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the state courts cited by them on this point in support of the action of the circuit court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that state, and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there.

The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, ac-

ording to its established principles, have granted the relief which was given in this case.

It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this [*418] must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief.

As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain for seventeen years but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them, when the error, if any existed, only needed a comparison of their own bill of particulars with the report of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside.

It follows that the judgment of the circuit court must be reversed, with directions that the order vacating the former judgment be set aside, and the motion of plaintiffs in that matter be overruled.

So ordered.

GOLDREYER v. CRONAN, in Conn. Sup. Ct. of Errors, July 24, 1903
—76 Conn. 113, 55 Atl. 594.

TORRANCE, C. J. The complaint in this case alleged that the defendant owed the plaintiff divers sums of money, the amount of one of the items being \$300. The trial court allowed this item and disallowed the others. The case was tried at the November term of the court in 1902, and decided at the January term, 1903, the precise date of judgment being the 26th day of February, 1903. On that day the judge filed in court a paper called "memoranda on which judgment is based," which, after reciting the substance of the evidence in the case, stated that the court allowed the \$300 item and disallowed the others, and ended with these words: "Judgment for plaintiff to recover \$300, and costs. *J. Bishop, Judge.*" On the same day the following entry was made on the file in said case: "Judgment for the plaintiff to recover \$300. New Haven, February 26th, 1903. *J. Bishop, Judge.*"

It does not appear that any formal judgment in accordance with said memoranda was ever entered up, but on the 11th of March, 1903, the court ordered judgment for \$400.50 in favor of the plaintiff to be formally entered up, and this was done under the following circumstances, as stated in the finding: "On March 2d, 1903, the plaintiff and defendant appeared in court, and Judge Julius C. Cable, one of the judges of the court, directed the clerk to call in Judge Bishop to hold said court. Said court was duly opened by the sheriff, and thereupon the plaintiff orally moved that the judgment be corrected by adding interest. The defendant objected to such correction on the ground that the January term of said court had ended, and the March term begun; and further, that if the court had jurisdiction the plaintiff was not in law entitled to such interest; and further, that the plaintiff by his failure to prosecute his suit with due diligence waived whatever right if any he had to interest on the judgment. On March 11th, 1903, the court granted said motion of the plaintiff, and corrected said judgment, and added the interest, amounting to \$100.50."

It will thus be seen that the judge, through said signed memoranda, announced in effect that he found the damages [*115] to be \$300, and that he rendered judgment for the plaintiff for that amount only, and costs of suit. After this the case was not continued to the next term, nor was it held for further consideration or advisement, nor was any further action of the court necessary to entitle the plaintiff to the entry of a formal judgment in his favor for \$300 damages and costs.

Assuming for the present that the entry of judgment thus made was a true entry of the judgment actually rendered, we must regard the judgment, for the purposes of this case, as one finally disposing of the case until set aside or annulled by some competent court of review. "The memorandum * * * must be regarded as the final act of the judge, the act which exhausted the *residuum* of power over the cause after final adjournment." *Sturdevant v. Stanton*, 47 Conn. 579, 581. The case was finally disposed of at the January term of the court, 1903.

Under these circumstances we think that what the trial court did in this case in March must be regarded as having been done at the March term of the court, 1903 (which by law began on the second day of that month), and not as done at, or as of, the preceding January term. The case, then, must be regarded as one in which a final judgment at one term was, at a subsequent term, set aside and another judgment substituted therefor; and

the **ultimate** controlling question in the case is whether the court had **the** power to do this.

The plaintiff claims that on the 26th of February, 1903, the court **did** in fact render judgment for \$400.50, but that by a clerical **mistake** a different and a smaller amount was entered up. If **the** record sustains this claim, it may be conceded, for the purposes of this case, that the court had the power to correct the **mistake** at the succeeding term; or at least that a new trial would not **be** granted on account of its action in so doing. Mistakes **merely** clerical, by which the judgment as recorded fails to *agrée* with **the** judgment in fact rendered, may be corrected at a term **subsequent** to that in which the judgment was rendered, upon **proper** notice to all concerned. Over its recorded judgments the [*116] court may exercise two powers: (1) the power to correct and **amend** the record so that it shall truly show what the judicial **action** in fact was; (2) the power to set aside, annul and vacate **such** judgments. It is well settled that these powers may **be** exercised during the term in which the judgment is rendered, and, speaking generally, that the first can be exercised at any **subsequent** term; while as a rule the second cannot be so exercised, save under exceptional circumstances. *Tyler v. Aspinwall*, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758; *Wilkie v. Hall*, 15 Conn. 32, 37; *Weed v. Weed*, 25 id. 337; *Hall v. Paine*, 47 id. 429; *Sturdevant v. Stanton*, 47 id. 579; *Bronson v. Schulten*, 104 U. S. 410; *Foster v. Redfield*, 50 Vt. 285; *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. Rep. 1077; 1 Black on Judg., Chap. 9, §§ 153, 158, and cases there cited.

The case thus turns upon the question whether the claimed **mistake** was a judicial one, in failing to include interest in the judgment as rendered, or a clerical one, in failing to include interest in the judgment as recorded. If the mistake was of the **former** kind the court, upon the facts found, had no power to **correct** the mistake at the March term. The claim that the **mistake** was a clerical one is based entirely upon the following part of the finding: Upon the facts found in the paper called "memoranda on which judgment is based," the court found the issues for the plaintiff "and allowed the item of \$300, but in entering the judgment, by oversight, inadvertence, and mistake, accidentally omitted to add thereto the interest from the time it fell due to the date of the rendition of the judgment." This is the only finding upon this point, and, when read in the light of the other parts of the record, we do not think it supports the contention

that the mistake was a mere clerical one. What does the phrase "in entering the judgment," as used in this finding, mean? It can only mean the act of the judge in making the memoranda signed by him; for the record does not show that any other "entry" of the February judgment was ever made by anybody at the January term of court. It may be conceded that the fair inference from this finding is that the [*117] court intended to include interest in the judgment to be rendered, and to enter such judgment in said memoranda; but the question is, does the record show that the court did in fact render such judgment? The finding, as we have seen, is in effect that in making the signed memoranda the judge by mistake failed to include the interest; but it does not say that judgment as actually rendered did in fact include interest; and the record nowhere explicitly states that important fact. A judgment, speaking generally, is the determination or sentence of the law speaking through the court; and it does not exist as a legal entity until pronounced, expressed, or made known, in some appropriate way. It may be expressed orally, or in writing, or in both of these ways, in accordance with the customs and usages of the court in which the judgment is rendered.

In the case at bar the February judgment was pronounced in writing only in and by the signed memoranda of the judge. There is no finding that it was ever otherwise pronounced or made known. Before that entry was made the judgment had no existence; when it was made, the judgment first came into being. The entry of it was thus the only expression of it, the only declaration of it, ever made by the judge. It was both pronounced and entered up, so to speak, in the same words and at the same moment. Of necessity, then, the judgment "entered up" was the same as the judgment actually pronounced. It thus clearly appears from the record, outside of the finding now under consideration, that the entry of the judgment made by the judge is a true record of the judgment actually rendered, and cannot, in the nature of things, be other than a true record; and we think there is nothing in that finding absolutely inconsistent with this conclusion. When read in the light of the other facts found, all that the finding can fairly be said to mean is, that the court, by mistake, accidentally failed to include interest in its signed memoranda; and that is equivalent to saying that the court failed to include interest in its judgment, and also in its record of it. We think any other view of the finding is untenable.

in view of the other facts set forth in the record. [*118] It follows that the court in March had no power to correct, amend, or change the February judgment.

There is error, the March judgment is set aside, and the cause is remanded that judgment may be entered up as of February 26th, 1903, for \$300 and costs.

In this opinion the other judges concurred.

BARNES v. GROVE, Circuit Judge, in Mich. Sup. Ct., Oct. 24, 1893—
97 Mich. 212, 56 N. W. 599.

HOOKE, C. J. Relator obtained a decree upon a bill [*213] filed by her in the Kent county circuit court, in chancery, which decree was entered upon the 1st day of April, 1892. At the same time a similar decree was made in a cause between Urial Barnes and the same defendants, being heard upon the same proofs, and in all respects similar to said first-mentioned cause. One case was made, settled, signed, and filed in both causes, and separate certificates were made, one entitled in each case. The appeal fee of five dollars was not paid in this case until October 13, 1892. Costs were taxed, and paid to prevent a threatened levy and sale on execution. The case of Urial Barnes was heard and reversed by the Supreme Court, whereupon a petition for rehearing was filed by defendants. This petition was made promptly after the decision of the Supreme Court was announced, but not until 14 months had expired after the entering of the decree. The cause had not been enrolled.

It is contended by relator that the time during which the defendants could apply for a rehearing was limited to the time within which an appeal might have been taken. This is the rule laid down in *Benedict v. Thompson*, Walk. Ch. 446. The English practice seems to have made enrollment the termination of the period within which a rehearing could be granted. Danl. Ch. Pl. & Pr. 1475. Until that time the decree was not considered a record of the court, and might be altered upon rehearing. Id. 1019, 1475. The same rule appears to have prevailed in New York. 1 Barb. Ch. Pr. 352. In some cases rehearings have been allowed several years after the decrees were rendered. Danl. Ch. Pl. & Pr. 1476, and cases cited. And the fact that the decree has been carried into execution does not prevent a rehearing. Id. 1467, 1476.

But departures have been made from this practice under

rules of court. Thus, by a rule of the English court of [*214] chancery, "a petition for a rehearing must be presented within a fortnight after the order pronounced." Walk. Ch. 447. And the decision in Walker is based upon rule 105 of the court of chancery of Michigan, adopted to take effect January 1, 1839. The following is a copy of that rule:

"On filing a bill of review, or other bill in the nature of a bill of review, the complainant shall make the like deposit, or give security to the adverse party in the same amount, which is or would be required on an appeal from an order or decree complained of; and no such bill shall be filed, either upon the discovery of new matters or otherwise, without special leave of the court first obtained, nor unless the same is brought within the time allowed for bringing an appeal." See "Rules and Orders of the Court of Chancery of the State of Michigan, Revised and Established by the Chancellor in January, 1839."

Under the settled doctrine that a bill of review was the remedy, to the exclusion of a petition for rehearing, after enrollment, it logically followed that the latter must be limited by this rule, which was accordingly so held in the case of Walker. Nine years after this case was decided the rigor of this rule was mitigated, an exception being added as follows, viz., "except upon newly-discovered facts or evidence." In such cases it would seem that bills of review could again be filed as before. And in the "New Rules," adopted in 1858 by this court, the rule is still further amended by adding the words, "unless upon reasons satisfactory to the court." See Chancery Rule No. 101. This seems to have restored the practice of permitting bills of review to be filed in proper cases after the time for appeal has passed. The limitation being removed restores the old practice in relation to review and rehearing, except as limited by the existing rule. Accordingly we find that in *Warner v. Juif*, 38 Mich. 667, this court notices the want of excuse for delay in passing upon an application [*215] for rehearing, which it would have had no occasion for doing had the rule of 1839 been in force.

The respondent having the power to grant a rehearing, we cannot interfere with his discretion, unless clearly abused. We think this a proper case for its exercise.

The writ of *mandamus* will be denied.

The other justices concurred.¹

¹ The petition for rehearing stated that the appeal fee was not paid within 30 days for the reason that defendants' solicitor desired that one

WALKER v. MOSER, in U. S. C. C. of App., Eighth Circuit, July 28, 1902—54 C. C. A. 262, 117 Fed. 230.

LOCHREN; D. J. That an order granting or refusing a new trial rests in the discretion of the trial court, and is not reviewable, has been the uniform holding of the federal courts. It is needless to cite authorities, but many will be found in 1 Desty, Fed. Proc. (9th Ed.) 661.

The argument that the decision of the motion for new trial came too late, because made after the term had ended at which the verdict was rendered, is not sound. A cause, and the parties to it, are before the court until the end of the term at which the final judgment of the court is entered; and the jurisdiction of the court over the cause and the parties continues after such term, if during the term a motion respecting the judgment is entertained or allowed, and held open for further consideration. "It is a general rule of the law that all judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. But it is a rule, equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them." *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 997. "Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance. In this case the motion to allow a reargument went over as unfinished business, and carried the parties with it. The proceeding was in all material respects like a motion for a new trial filed in time at one term and not disposed of until the next. Under such circumstances a judgment or decree, although entered in form, does not discharge the parties from their attendance in the cause. They

appeal should decide both cases, thus saving costs to the parties, and that he believed that no advantage would be taken of this fact by complainant's solicitors until execution for costs issued; that thereupon such appeal fee was paid, and defendants applied to the Supreme Court for leave to perfect the appeal, which was denied because of a want of authority to grant such leave where the appeal fee was not paid within the statutory time; and that since such denial no action has been taken, except the payment of costs, defendants waiting to ascertain the result in the appealed case.

must remain until all questions as to the finality of what has been done are settled. The motion when entertained prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding." *Goddard v. Ordway*, 101 U. S. 745, 751, 24 L. Ed. 237.

The November term is fixed by act of congress to begin on the second Monday of that month. In 1900 it began on November 12th. The order entered at the October term, permitting the motion for new trial to be filed by November 15th, and the fact that such motion was not disposed of at the October term, caused it to go over as unfinished business to the November term, carrying over the cause and the parties. Such would have been its effect had judgment been entered at the October term upon the verdict. But no judgment in the cause was entered at that term, and the cause necessarily, and irrespective of the pending motion for new trial, passed over to the November term for the entry of judgment, and any other action that might be taken in the case.

[*233] The order granting a new trial, as entered of record in this case, shows upon its face that it was made "at the November, A. D 1900, term of said court, and on the 12th day of April, 1901." Counsel for plaintiffs in error argue that April 12, 1901, could not have been in the November, 1900, term because a term fixed by statute to be held at another place in the district on the third Monday in January would intervene. But, if the business of the November term made such course desirable, that term might have been continued to a date beyond the January term. This court will not presume that the circuit court has committed errors not made to appear, nor that it has falsified its records. The court having at the proper time allowed the motion for new trial to be filed, it would pass from term to term as unfinished business in the cause, until disposed of. It is unnecessary to consider the effect of plaintiffs' participation in the subsequent trials.

The judgment is affirmed.

THE EFFECT OF THE JUDGMENT AS AN ESTOPPEL OR BAR

BAR TO ANOTHER ACTION FOR THE SAME CAUSE.

WYMOND'S CASE, in Cornish Iter, 30 Edw. I, A. D. 1302—Year Book
30 & 31, Edw. I, p. 198.

A poor woman complained by bill that William Wymond on a certain day in a certain year, and at a certain place, beat and wounded her, &c., and her goods &c. *Hunt*: She ought not to be answered, because she herself formerly, in the county court, complained of the same trespass, and we appeared and went down to an inquest, and it was found by the verdict of the inquest that we had not committed any trespass against her; judgment, &c. *Kyng*: We have counted against you and you do not answer: judgment, &c. *Mutford*: Since he was acquitted by the verdict of the inquest, if we were now to have another inquest, it would be to attain one inquest by another. *HERVY*: Perhaps it was not the same trespass. *Hunt*: The same trespass, ready, &c. *BUMPTON*: Answer over. *Hunt*: Not guilty, ready, &c.

FERRERS v. ARDEN, in Court of Common Pleas of England, Mich.
Term, 40 & 41 Eliz., A. D. 1599—Cro. Eliz. 668.

Trespass upon the case upon trover and conversion of an ox of the plaintiff's at Ashton, the 10th June, 38 Eliz. The defendant pleads, that at another time, viz. Easter Term, 36 Eliz., in the queen's bench, the plaintiffs and a fourth person who is now dead, brought trespass against Simon Wignal and two others, of their ox taken 11th April, 35 Eliz; that the defendants thereto appeared, and justified as for an heriot in the right of the now defendant; upon which bar the plaintiffs demurred; and adjudged against them; and pleaded all the record in certain; and avers: that the plaintiff in the said action and in this action are one and the same persons; that the ox in the said action and in this is one and the same; and that the taking in this and in the other action are all one; and that the trover and conversion supposed in this action by this defendant only was committed by the other defend-

ants with him, and they have covinously and subtly omitted and left them out and not named them in this action; and this defendant was omitted out of the other action subtly, they being one and the same trespass, thing, and matter, and not divers, and at one and the same instant of time done; *et hoc paratus est verificare unde ex quo*, &c. They were acquitted in the first action, and he demands judgment whether the plaintiffs to this action of the same matter and cause shall be received to have and prosecute? And hereupon the plaintiffs demurred.

WALMSLEY and KINGSMILL held the bar to be good: because upon the first judgment, upon demurrer, the property of the ox was admitted in that defendant, in whose right the justification was; therefore the plaintiffs shall not have this action without new cause; and although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass; wherefore he well may plead it, and take advantage thereof, and hereto the other justices agreed, that if it be intended for one same cause, that he well might take advantage thereof. But ANDERSON and GLANVILLE conceived here that they were not barred; for a bar in a wrong action brought is not any bar where a right action is brought; as where one delivers goods to keep, and brings trespass against the bailiff for these goods, and is barred by verdict or demurrer, that shall not be a bar unto him in bringing detinue or account. And here these actions are of several natures; and a bar in the one cannot be said to be a bar in the other. WALMSLEY agreed that where it is a bar in an action of trespass, upon not guilty pleaded by verdict, he may have this new action; because it appears not but that the verdict was upon the mispraisal of the nature of the action; so it is if such a case appears upon demurrer; but where a title is pleaded in bar to a thing demanded, and by reason thereof the plaintiff is barred upon demurrer or verdict, the interest thereby is bound, and the plaintiff shall be barred from bringing a new action. *Et adjournatur*. And afterwards the matter was ended by arbitrament.

FERRER'S CASE, in Court of Common Pleas of England, Mich. 40 & 41, A. D. 1599—6 Coke 7.

Between Ferrer and Arden these points were resolved: 1. When one is barred in any action real or personal, by judgment on demurrer, confession, verdict, &c., he is barred as to that or the like action of the like nature for the same thing forever; for

expedit reipublicae ut sit finis litem. But there is a difference between real actions and personal actions; for in a personal action, as debt, account, &c., the bar is perpetual, for the plaintiff cannot have an action of a higher nature, and therefore, in such case he has no remedy but by error or attain; but if the demandant be barred in a real action by judgment on a verdict, demurrer, confession, &c., yet he may have an action of a higher nature and try the same right again, because it concerns his freehold and inheritance. As if a man be barred in an assize of novel disseizin, yet upon showing a descent, or other special matter he may have an assize of *mort d'ancestor*, *aiel*, or *besaiel*, entry *sur disseizin* to his ancestor. So it was said, if a man be barred in a *formedon in descender*, he may have a *formedon in reverter* or remainder, for that is an action of a higher nature; for therein the fee-simple is to be recovered, according to the opinion in *Robinson's Case*, 5 Coke 33 [below]. And if anyone be barred in a real action of the seizin of his ancestor or of his own possession, he may have a writ of right, in which the matter shall be tried and determined again. But a recovery or bar in an assize is a bar in every other assize, and a writ of entry in the nature of an assize; for both are of his own possession and of one and the same nature between the same parties. So a bar in a writ of *aiel* is a bar in a writ of *besaiel* or *cousinage*, &c., for these are ancestral and of one and the same nature, & *sic de caeteris*. So that the law has provided greater safety and remedy for matters of freehold and inheritance than for debts and chattels; for there, once barred always barred (as has been said), unless it be in special case, as appears in the said *Robinson's Case*. * * *

And it is to be observed, that when any one brings an assize of novel disseizin, *mort d'ancestor*, writ of entry *sur disseizin*, or any other real action, and is barred by judgment upon demurrer or verdict, &c., the demandant and his heirs are not only barred of the same action, but also as long as the record of the judgment stands in force he and his heirs are barred of their entry, and are put to their action of a higher nature: See 25 Hen. VIII, Dyer 5. And where it is said in the books that privies shall not falsify in the point tried, that is as much as to say that they shall not falsify in a *scire facias* on the same judgment, or in any other writ of the same nature: but he may bring an action of a higher nature, and therein try the matter again, as it hath been said before. But in *Robinson's Case*, forasmuch as the defendant in the first action gave the plaintiff &c. an action as executor, and per adventure the plaintiff at the time he brought his action as adminis-

trator did not certainly know of the will, forasmuch as (as it is said in 27 Hen. VI, Fitz. Abr. Estoppel 273) he may be made executor unknown to him; for this cause there in the said *Robinson's Case* it was adjudged for the plaintiff. * * *

It hath been well said *interest reipublicae ut sit finis litum*; otherwise great oppression might be done under color and pretense of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right, by suits and actions; and in the end, because he cannot come to an end, compel him (to redeem his charge and vexation) to leave and relinquish his right, all which was remedied by the rule and reason of the ancient common law; the neglect of which rule (by introducing of trials of rights and titles of inheritances and freehold in personal actions, in which there is not any end or limitation of suits) hath therewith introduced four great inconveniences: 1, infiniteness of verdicts, recoveries, and judgments, in one and the same case; 2, sometimes contrarieties of verdicts and judgments one against the other; 3, continuance of suits for 20, 30, and 40 years, to the utter impoverishment of the parties; 4, all this tends to the dishonor of the common law, which utterly abhors infiniteness and delaying of suits; wherein is to be observed the excellency of the common law; for the receding from the true institutions of it introduces many inconveniences, and the observation thereof is always accompanied with rest and quietness, the end of all humane laws. * * *

ROBINSON'S CASE, in Common Pleas of England, Easter Term, 1 Jac. I, A. D. 1604—5 Coke 33.

Robinson and others, executors of J. Robinson, brought an action of debt on a bond against Robinson; the defendant pleaded that before the purchase of this writ, one of the plaintiffs, as administrator of J. R., brought an action of debt on the same bond in this same court against the defendant, who then pleaded, that J. R. made executors who administered, and traversed that he died intestate; then the plaintiffs replied, that administration was committed to him *pendente lite* between the executors of the said will; on which the defendant demurred; and it was adjudged for the plaintiffs. And this plea was pleaded by way of estoppel and judgment demanded, if he as executor should have an action of debt against the defendant on the same bond. The plaintiffs replied and showed the repeal of the letters of administration, and

that the plaintiffs are executors; on which the defendant did demur, he pretending that forasmuch as one of the plaintiffs was barred by the former action, that they should be barred forever. And the cause was well debated at the bar and bench; and at last judgment was given for the plaintiffs. For it was unanimously agreed, that by the former judgment the plaintiffs were barred as to the action of the writ, *scil.* to have any action as administrator; but although he then in truth was executor, yet the mistaking of his action is no bar nor estoppel to bring his true action; as if an heir bring a formedon in the descender, and be barred therein, yet he may have a formedon in the remainder or reverter. See 3 Ed. III, 21; 4 Ed. III [Fitz. Abr.], Estoppel 133; 19 Ed. III, [Fitz. Abr.], Estoppel 227; 18 Ed. III, 31; 40 Ed. III, 21; 2 Ric. II [Fitz. Abr.], Estoppel 210; 6 Hen. IV, 4; 11 Hen. IV, 30; 2 Ric. III, 14; 21 Hen. VII, 24; 7 Ed. VI [Fitz. Abr.], Estoppel 162.

LAMPEN v. KEDGEWIN, in Common Pleas of England, Trinity Term, 27 Car. II, A. D. 1677—1 Mod. 207.

An action in the nature of conspiracy was brought by the plaintiff against the defendant, in which the declaration was insufficient. The defendant pleaded an ill plea, but judgment was given against the plaintiff upon the insufficiency of the declaration; which ought to have been entered 'that the defendant go thereof without day;' but by mistake, or out of design, it was entered 'that the plaintiff take nothing by his bill.' The plaintiff brings a new action, and declares right. The defendant pleads the judgment in the former action, and recites the record verbatim as it was; to which the plaintiff demurred; and judgment was given for the plaintiff, *nisi causa*, &c.

NORTH, C.J. There is no question but that if a man mistake his declaration, and the defendant demur, the plaintiff may set it right in a second action: but here it is objected, that the judgment is given upon the defendant's plea. Suppose a declaration be faulty, and the defendant take no advantage of it, but pleads a plea in bar, and the plaintiff takes issue, and the right of the matter is found for the defendant; I hold, that in this case the plaintiff shall never bring his action about again, for he is estopped by the verdict: or suppose such a plaintiff demur to the plea in bar; there by his demurrer he confesseth the fact, if well pleaded, and this estops him as much as a verdict would; but if

the plea were not good, then there is no estoppel. And we must take notice of the defendant's plea; for upon the matter, as that falls out to be good or otherwise, the second action will be maintainable or not. The other judges agreed with him *in omnibus*.

WATERHOUSE v. LEVINE, in Mass. Sup. Jud. Ct., Jan. 6, 1903—182 Mass. 407, 65, N. E. 822.

BARKER, J. The defendant contends that the plaintiffs cannot maintain this action because judgment was rendered for the defendant upon a trial in a previous action between the same parties and for the same cause of action. Evidence was admitted in this action against the defendant's exception that the former judgment was upon the ground that the first suit was prematurely brought, the goods for the price of which both suits were brought having been sold upon a credit which had not expired when the first action was begun. The judge found as a fact that the only issue decided in the former action was whether that action was prematurely brought, and that the former judgment was entered because the action was prematurely brought and for that reason alone.

The only answer in the former action was a general denial. But under that answer the defence that the goods were bought upon a credit not expired when the suit was begun was open. *Wilder v. Colby*, 134 Mass. 377, 380, distinguishing *Reed v. Scituate*, 7 Allen 141. See also *Fels v. Raymond*, 134 Mass. 376; *Franklin Savings Institution v. Reed*, 125 Mass. 365; *Benthall v. Hildreth*, 2 Gray 288; *Morrison v. Clark*, 7 Cush. 213. Whether oral evidence would be admissible to show that a former judgment went solely upon an issue which strictly could not have been tried upon the pleadings as they stood, but was in fact tried with the assent of all parties, is a question upon which we express no opinion.

[*409] It is only when rendered upon the merits that a judgment constitutes an absolute bar to a subsequent action for the same cause and the parties are concluded upon all issues which might have been tried. *Foye v. Patch*, 132 Mass. 105, 110; *Tracy v. Merrill*, 103 Mass. 280; *Maxwell v. Clarke*, 139 Mass. 112, 29 N. E. 224; *Cobb v. Fogg*, 166 Mass. 466, 477, 44 N. E. 534. In the absence of proof that an issue actually was tried and determined in arriving at a former judgment, it is conclusive by way of estoppel only as to those facts which necessarily were involved,

and without proof of which it could not have been rendered. *Burlen v. Shannon*, 99 Mass. 200; *Eastman v. Symonds*, 108 Mass. 567. See *Morse v. Elms*, 131 Mass. 151, 152; *Watts v. Watts*, 160 Mass. 466, [post 195].

When the question whether a certain issue was in fact determined in a former suit is to be tried, oral evidence is competent upon that question. *White v. Chase*, 128 Mass. 158; *Evans v. Clapp*, 123 Mass. 165; *Dutton v. Woodman*, 9 Cush. 255, 261; *McDowell v. Langdon*, 3 Gray 513, 514.

Exceptions overruled.

BLEAKLEY v. BARCLAY, in Kansas Sup. Ct., April 6, 1907—75 Kan. 462, 89 Pac. 906, 10 L. R. A. (n. s.) 230.

Appeal from the judgment of the district court of Douglas county awarding custody of a child to petitioners (Barclay) on a writ of habeas corpus charging that appellant acquired possession of the child by a decree of the circuit court of Rock Island county, Illinois, and obtained such judgment by fraud and perjury in then testifying that she was the mother of the child, when she knew such was not the case; and "these petitioners direct the court's attention to the fact that circumstances are here presented unknown to the said circuit court of Rock Island county and unknown to these petitioners at the time of the hearing upon said writ of *habeas corpus*, viz., that the child is not the child of the appellant. Four errors are assigned: 1, denying the motion to quash the writ; 2, denying full faith and credit to the Illinois judgment; 3, permitting that judgment to be collaterally impeached; 4, permitting testimony to be introduced under the petition.

PORTER, J. * * * The various assignments of error are all predicated upon the force and effect of the Illinois judgment. If that judgment is *res judicata* the motion to quash should have been allowed, provided it sufficiently appeared by the petition for the writ that a court of competent jurisdiction had decided the cause of action [*469] adversely to the petitioners. Obviously the petition was drawn upon the theory that the averments to the effect that the Illinois judgment was obtained by means of perjured testimony permitted a collateral attack upon the judgment. It recites the name of the Illinois court and declares that it is a court of competent jurisdiction; it alleges that the respondent obtained a judgment of that court awarding her the custody of the

child, and the only excuse alleged for invoking the aid of the Kansas court is that the respondent procured the judgment by false and perjured testimony. But fraud only inheres in the judgment when it affects the jurisdiction; no other fraud can be relied upon in a collateral attack. It is conceded that the Illinois court had jurisdiction of the parties and of the subject-matter. Fraud is no ground for an attack by a party to the judgment. This is elementary. Third parties may impeach a judgment collaterally, because they are not bound by it. "Judgments of any court can be impeached by strangers to them for fraud or collusion; but no judgment can be impeached for fraud by a party or privy to it." 2 Freeman, Judg. § 334. See, also, *Field v. Sander-son's Adm'x*, 34 Mo. 542, 86 Am. Dec. 124; *Greene v. Greene*, 68 Mass. 361, 61 Am. Dec. 454; *El Capitan Land & Cattle Co. v. Lees*, 13 N. M. 487, 86 Pac. 924.

In *Peck v. Woodbridge*, 3 Day (Conn.) 30, false testimony and forgery were alleged as grounds to impeach the former judgment, but the foregoing rule was enforced because it was said to be necessary to the administration of justice that when a case is once finally decided it must be held to end the litigation between the parties. The consequences of permitting such an attack are apparent when we consider that if the Barclays could, in this proceeding, set aside the former judgment for the reason that it was obtained by means of perjured testimony, it must follow that the respondent would be entitled in still another proceeding [*470] to set up the same grounds to defeat the judgment in this. "The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained." 2 Freeman, Judg., § 334. See, also, *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Boston and Worcester Railroad Corporation v. Sparhawk & Wife*, 83 Mass. 448, 79 Am. Dec. 751; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. All courts are likely to be deceived by perjured testimony, and to permit a defeated party to go to another court—foreign or domestic—and procure a retrial of the same issues on the ground that the successful party had fraudulently procured the former judgment upon false testimony would make litigation endless and judgments as unsubstantial as the stuff that dreams are made of.

The respondent objected to the introduction of any testimony

under the pleadings, on the ground that all the issues had been determined by the Illinois judgment. This was overruled, the court holding that the question of motherhood was not an issue in the former proceeding and that the only question involved was the validity of the deed of adoption. It is one of the principal contentions of the petitioners that the motherhood of the child was not an issue in the former proceeding, but was excluded therefrom by a ruling of the court of Illinois. It appears that the Barclays, after setting up the deed of adoption executed by Mrs. Bleakley as the mother, attempted in another allegation of the return to deny that she is the child's mother, and a motion to strike out the latter allegation as inconsistent with the former was allowed. It therefore becomes necessary to inquire whether the motherhood of this child was determined by the Illinois court. It is elementary that the judgment rendered [*471] and not the opinion must be looked to in order to find the thing adjudged. The reasoning of the court forms no part of the judgment. *Hopper v. Arnold*, 74 Kan. 250, 86 Pac. 469. At the same time, the inquiry is not always confined to the formal issues as defined by the pleadings, nor to the formal parts of the judgment. In *Redden v. Metzger*, 46 Kan. 285, 289, 26 Pac. 689, 26 Am. St. Rep. 97, the following language from *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733, is quoted with approval: "The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, 'upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion'." See, also, *State Bank v. Rude, Adm'r*, 23 Kan. 143; *Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. 508; *Shepard v. Stockham*, 45 Kan. 244, 25 Pac. 559.

Mrs. Bleakley's petition for the writ alleged that she was the child's mother. The return and answer alleged that as the mother she had executed a deed of adoption. The court, by striking out as inconsistent the allegation that she was not the mother, held that the other allegations admitted the contrary to be true. At the close of the evidence the Barclays filed a motion for judgment, on the ground, among others, that "it is not shown that the said infant is the child of the relator," recognizing clearly that the motherhood of the child was involved as a primary fact. The court denied this motion, and after holding the deed of adoption

void for the reason that it did not conform to the laws in relation to the adoption of children in force in Illinois, where the Barclays resided when they executed it, nor to those in force in Missouri, where the child was at the time, nor to the laws of Kansas, where the mother of the child resided when she executed [*472] it, also made as a part of the judgment the following: "The court further finds that the said Edith Bleakley is the daughter of the said Charlotte E. Bleakley and J. J. Bleakley, and that she was born on the 15th day of February, A. D. 1904."

It is said in volume 2 of the second edition of Black on Judgments, section 614: "The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. * * * For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not." How can it be said that the fact that the respondent is the mother was not essential to that part of the judgment holding the deed of adoption void because it failed to comply with the laws of Kansas, where the mother of the child resided, or that, in determining the invalidity of the deed, the mind of the court was not brought to bear upon it so that it has been judicially decided? In addition, there is the adjudication in the judgment itself that Mrs. Bleakley is the child's mother. True, it was not presented by the pleadings as an issue in the sense of being affirmed on the one side and denied on the other, for the Barclays admitted it by seeking to establish their claims upon the basis of its truth. They claimed through and under Mrs. Bleakley as the mother, and cannot now, after submitting their claims upon that theory, be permitted to set up the contrary. "It is not necessary to the conclusiveness of the former judgment that issue should have been taken [*473] upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment." *Lee v. Kingsbury*, 13 Tex. 68, 71, 62 Am. Dec. 546.

The contention of the Barclays that the deed of adoption was valid could only have been sustained upon the theory that it was executed by the mother. On the other hand, the judgment

in favor of Mrs. Bleakley could not have been rested upon any other ground than that her claim to be the child's mother was found by the court to be true. Within the rule approved in *Redden v. Metzger*, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97, it is apparent that by reasoning back from the judgment to the basis on which it stands we find the judgment could only be based upon the premise of motherhood, and this premise is as much a thing adjudicated as the conclusion itself. We have no hesitation in reaching the conclusion that the question of motherhood was inseparably interwoven with the proceedings in Illinois and was judicially determined therein. The action of that court in allowing the motion to strike out inconsistent allegations in the return did not have the effect which is now claimed. The ground upon which relief is sought in this proceeding is that Mrs. Bleakley procured that judgment by falsely swearing to a fact which it is now said was never in issue.

The petitioners contend that the decree of the Illinois court did not deprive the Kansas court of jurisdiction to hear and determine another *habeas corpus* proceeding, for the reason that the record discloses a change in the situation and conditions surrounding the child from what was disclosed to the Illinois court. The changed conditions which it is argued are sufficient to warrant the interference of the Kansas court are said to consist of certain facts which it is urged are disclosed for the first time upon the trial of this case, and which it is claimed establish beyond question that the respondent is a perjurer and [*474] an abortionist, and therefore morally unfit to have the custody of the child. These facts, it is argued, make it the solemn duty of the Kansas courts to take the child from her and give it to the petitioners. The charge of perjury is based upon the claim that she is not the child's mother, and that therefore her testimony in Illinois was false. The respondent brings up none of the evidence, and, while it is true that the petitioners are entitled to every presumption that the evidence was sufficient to support the judgment, that presumption only goes to the extent of covering such facts as the pleadings would warrant evidence upon. There is no inference from the judgment that there was evidence that Mrs. Bleakley is or ever was an abortionist. We would have as much right to infer from the judgment that she was an ex-convict or a shoplifter; for there is no word or charge in the pleadings intimating that she is or ever has been guilty of any immoral conduct, except the allegation that on the former trial she com-

mitted perjury. It must be admitted that even this charge was not made for the purpose of showing a change in the conditions surrounding the child, but solely for the purpose of furnishing grounds upon which to attack the validity of the former judgment. If Mrs. Bleakley is the mother, then she was not guilty of perjury or abortion; so that the charges of immorality are interwoven with the question whether in fact she is the mother, which we have seen was decided in her favor. * * * [*476] Having determined that the former judgment cannot be attacked on the ground of fraud in obtaining it by means of false testimony, that the question of the motherhood of the child was determined by that judgment, and that the judgment also found Mrs. Bleakley to be a suitable person to have, and that she is entitled to, the child's custody, there remains the single question, What effect shall be given here to that judgment? This question can have but one answer. Section 1 of article 4 of the constitution of the United States requires that full faith and credit be given to the judgments of sister states. This court will take judicial notice that the circuit court of Illinois is a superior court of general original jurisdiction. *Butcher v. The Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446; *Dodge v. Coffin*, 15 Kan. 277; *Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847. A judgment of a superior court of one state must be given the same effect in all respects in another state as in the state where it was rendered. *Barnes & Drake v. Gibbs et al.*, 31 N. J. Law 317, 86 Am. Dec. 210; *Cook v. Thornhill*, 13 Tex. 293, 65 Am. Dec. 63; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202, and note; *Welch et al. v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689; *Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629. * * * [*477] The petitioners contend, however, that a judgment in *habeas corpus* for the custody of a child is not *res judicata*, and rely upon the case of *In re King*, 66 Kan. 695, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399. In *Bleakley v. Smart*, 74 Kan. 476, 87 Pac. 76, it was said, however, that the decision in *In re King* is not in conflict with the doctrine declared in the case *In re Hamilton*, 66 Kan. 754, 71 Pac. 817, nor opposed to the following statement of the law in volume 1 of the fourth edition of Freeman on Judgments, section 324: "The principle of *res judicata* is also applicable to proceedings on *habeas corpus*, so far at least as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children." We are satisfied that the weight

of authority and sound reasoning support the doctrine that where the rights of conflicting claimants to the custody of a child are involved and determined in *habeas corpus* proceedings the judgment is binding and conclusive, and bars subsequent proceedings by the same parties upon the same state of facts. (To the same effect see *Cormach v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, and *Mahon v. The People*, 218 Ill. 171, 75 N. E. 768.) The trial court erred in refusing to give to the Illinois judgment the faith and credit required by the constitution and the laws made in pursuance thereof. * * * The judgment is reversed and the cause remanded, with directions to enter judgment for the respondent for costs.

ESTOPPEL IN ANOTHER ACTION FOR ANOTHER CAUSE.

In General.

JOHN BROKE'S CASE, in Common Pleas of England, Hilary term 9 Henry VI, A. D. 1431—Yearbook 9 H. VI, pl. 67.

In a writ of trespass against one John Broke. *Newton*: This same J. Broke and A. his wife were seized of the manor of B as of the right of A to which manor this same plaintiff is *villein regardant*; and the said J. B., and A., his wife, and all those whose estates they had in the said manor had been seized of the plaintiff and his ancestors as *villeins regardant* of the same manor from the time &c. * * * *Rolf* said that this same plaintiff heretofore brought a writ of trespass against one A who was then seized of the said manor in his *demesne* as of fee; and the said A claimed that the said plaintiff was his *villein* to the same manor; and he pleaded free, &c., which was found for him; and afterwards the said A brought attain of this, whereon the first inquest was affirmed; which estate the defendant has. And he demanded judgment if he should be allowed to say the plaintiff is *villein regardant* of the said manor; and he produced the record exemplified. BABINGTON [C.J.]: This may not estop in any manner; for you have not made him that is now defendant nor his wife heir of said A who was party to the record. *Rolf*:

But we have shown that he that is now defendant has the estate of said A; and in whatever manner he should be estopped, in the same manner shall each be who is in through him. MARTIN [J.] (to Rolf): This is a stronger case against you because he is a stranger to the record. PASTON [J.]: To my mind it is reason that he who has the manor should be estopped by this record, or otherwise each who is in such case after this that his *villein* is found free may make a feoffment, and the feoffee would not be estopped to claim him that was found free as his *villein*, &c. * * * To which *Newton* said that the said A was not seized of the said manor in his *demesne* as of fee at the time of the said writ of trespass purchased nor at any time pending the record: ready, and the other to the contrary.

DUCHESS OF KINGSTON'S CASE, in House of Lords of England, April 15-22, 16 Geo. III, A. D. 1776—Howell's State Trials No. 551, 2 Smith's Leading Cases *424, 1 Leach's Crown Cases 173, Ambler 756, 763.

Trial by the House of Lords, for bigamy. Elizabeth, calling herself duchess dowager of Kingston, the defendant herein, was indicted at Hicks hall, Middlesex, at the general session in oyer and terminer, for that, being the lawful wife of Augustus John Hervey, now earl of Bristol, she feloniously married Evelyn Pierrepont, late duke of Kingston. She was granted a removal of the prosecution to the House of Lords, there to be tried; and Henry, Earl of Bathurst, chancellor, was specially appointed lord high steward to preside at the trial. Upon being arraigned before the assembled lords in Westminster hall, Monday, April 15, she pleaded not guilty, asked trial by her peers, and, without waiting for the attorney general to open the case for the prosecution, addressed the lords; saying, that she had brought a suit in the consistory court of the bishop of London against said Hervey for boasting that they were married; to which he had appeared and affirmed his claim; and that by the sentence of said court it was decreed that she was free from all matrimonial contracts or espousals with the said Hervey; and that she was advised that the said decree, still in force and unimpeached, which she then asked leave to offer in evidence, was conclusive, and that no other evidence ought to be offered or stated respecting such pretended marriage. Thereupon the lords listened for three days to elaborate arguments on both sides by the ablest counsel in England as to

the admissibility and effect of the proposed evidence. The principal points argued were put in the form of two questions by Sir Francis Hargrave, who assisted the prosecution. After this profound argument the lords adjourned to the chamber of parliament to consider their decision, but without coming to any conclusion, entered the order given below, asking the opinion of the judges on said questions, and returned to the court in Westminster hall.

Friday, April 19th, 1776. ORDERED by the lords spiritual and temporal in parliament assembled, that the following questions be put to the judges, viz. :—

1. Whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

LORD DE GRAY. My Lords: My Lord Chief Baron [Sir Sidney Stafford Smythe] and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be [*425] admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent

jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction; they do not want or require the aid of the spiritual courts. * * * Where in civil causes they [the common law courts] found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate. A sentence in a case of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage. So a direct sentence in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action. So a sentence of nullity is equally evidence in a personal action against a defense founded upon a supposed coverture. [*428] But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence.

and had acquiesced under it; or claimed under those who were parties and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration: First, because the parties are not the same; for the king, in whom the trust of prosecuting public offenses, is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, in any manner intervene or appeal. Secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offenses, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to ecclesiastical courts is, merely, of a spiritual consideration, "*pro correctione morum, et pro salute animae.*" They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime, and its proofs; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the acts of Henry VIII. first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriage came within the Levitical degree, and prohibited the spiritual courts from giving or proceeding upon any other construction. Whilst an ancient statute subsisted (2 H. 4, c. 15), by which personal punishment was incurred on holding [*429] heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's court will examine all things ordained by statute." When the statute of Wm. III. made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's consent; or for a rape where the defense is, that "the woman is his wife;" in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find that sentences, in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape, and the court must receive such sentences as conclusive evidence, in the first instance, without looking into the case: it would vest the substantial and effective decision, though not the cognizance of the crimes, in the spiritual court, and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which sentences favorable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavorable to the prisoner, are in like manner conclusive evidence [*430] against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge, without exercising any judgment of their own?

The spiritual court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in Lord Hobart's reports it is held, that they cannot proceed to deprive for felony, before the felon has been tried at law; and although, after conviction, they

may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict: because, as that very learned judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belongs to them to do."

If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath), will direct or rule a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court competent to the inquiry then before them; from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction. [*431]

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz., "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause; and if such sentence is no plea to a new suit there,

and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence from going into new proofs to make out that or any other marriage.

So that, admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all; and, by the rule laid down by Holt, L. C. J., such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment may stand well together, and both propositions be equally true: it may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal. [*432] In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practiced to prevent a fair defense; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default: or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas. In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time. In the proceedings of the ecclesiastical court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution of law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judg-

ment against it. In the more modern cases, the question seems to have been, whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the courts of temporal jurisdiction. And if a fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practiced upon for sinister purposes, as the courts in Westminster hall.

We are therefore unanimously of opinion: First, that a sentence in the spiritual court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy. But secondly, admitting such sentence to be conclusive [*433] upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

UNITED STATES v. BUTLER, in U. S. D. Ct. for E. D. Michigan,
April 29, 1889—38 Fed. Rep. 498.

Defendant was indicted for selling malt liquors without payment of the special tax required by law, and also for perjury, in swearing before a United States commissioner, upon his preliminary examination that he did not so sell. Upon his trial for selling liquor he was acquitted, and thereupon pleaded to the indictment for perjury *autrefois acquit*.

BROWN, J. It certainly strikes one as an anomaly that, after an acquittal for a criminal offense, a party may be put upon trial for perjury, in swearing that he was not guilty of that offense. * * * [*499] Whenever the same fact has been put in issue between the same parties, the verdict of the jury upon such issue is a complete estoppel. This case contains all the elements of a plea of *res judicata*; and the parties are the same; the point in issue, viz., whether he did in fact sell liquor, is the same, and the quantum of proof requisite in both cases is also the same. Had he sworn before the commissioner that he had paid his tax and had been acquitted by the jury upon the ground that he did not sell liquor, the issue would have been different, and perhaps such

difference might have been shown by parol, but in this case the two issues were identically the same. * * * While I do not find the doctrine of *res judicata* discussed in criminal cases, I see no reason why the general rule regarding estoppels should not apply, especially where the quantum of proof required in the two prosecutions is the same. If this party could be convicted of perjury in swearing to a state of facts which a jury in another [*500] case against him has found to be true, it would result that every criminal case in which the defendant takes the stand and is acquitted could be practically retried upon an indictment for perjury. This never could have been the contemplation of congress in allowing a defendant to be sworn in his own behalf.

I express no opinion as to whether, if he had been convicted, such conviction would act as an estoppel against him in a prosecution for perjury, as the question is not involved in this case.

Points not Essential to Prior Judgment or not Contested.

OUTRAM v. MOREWOOD, in Court of King's Bench of England, Hilary Term, 43 Geo. III, A. D. 1803—3 East 346.

LORD ELLENBOROUGH, C.J. [*352] This was an action of trespass for digging and getting the coals out of a coal mine, alleged by the plaintiff to be within and under his close called the Cow Close. The defendants plead, and show title regularly brought down to them in right of the wife, by fine, recovery, bargain and sale, releases, and descents, from one Sir John Zouch, who in the 39th of Elizabeth was seized in fee of the manor of Alfreton, and of certain messuages and lands within the manor, under which title they claim all the coals under those lands except such as were within * * * [a certain conveyance made by said Zouch]; and the defendants aver, that the coals in question were under the lands of that former owner Sir J. Zouch, and were derived by bargain and sale to certain immediate bargainees, and from them to the defendant the wife, and were not within or under any of the messuages, buildings, orchards, and gardens which are the subject of the exception. To this plea the plaintiff replies, and relies by way of estoppel upon a former verdict obtained by him in an action of trespass brought by him against one of the defendants, Ellen the wife of the other defendant, Henry Case Morewood, she being then sole; in which he declared for

the same trespass as now, to which the wife pleaded and derived title in the same manner as now done by her and her husband, and alleged that the coal mines in question, in the declaration mentioned, were at the time of making the before-mentioned bargain and sale by Sir John Zouch part and parcel of the coal mines by that indenture bargained and sold; [*353] upon which point (viz., whether the coal mines claimed by the plaintiff, and mentioned in his declaration, were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed) an issue was taken, and found for the plaintiff against the wife, one of the new defendants, her husband being the other defendant with her in the present action. And the question is, whether the defendants, the husband and wife, are estopped by this verdict and judgment thereupon from now averring (contrary to the title so there found against the wife) that the coal mines now in question are parcel of the coal mines bargained and sold by the indenture above mentioned?

The operation and effect of this finding, if it operate at all, as a conclusive bar, must be by way of estoppel. If the wife were bound, by this finding as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privy, either in estate or in law, would be equally bound, according to what is said in *Coke Lit.* 352 a: "Privies in estates, as the feoffee, lessee, &c.; privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law in the post, shall be bound by and take advantage of estoppels." The question then is: Is the wife herself estopped by this former finding to aver the contrary? In *Brooke Abr.* t. Estoppel, pl. 15 (who cites 33 Hen. VI, 7, 19, 50; and see also to same effect *Brooke Abr.* t. Estates 158, 2 Ed. IV, 17) it is said to be "agreed that all the records in which the freehold comes in debate shall be estopped with the land and run with the land; so that a man may plead this, as party or as heir, as privy or by *que estate*." But if it be said, that by the freehold coming in [*354] debate must be meant a question respecting the same in a suit in which the freehold was immediately recoverable as in an assize or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject matter of such title; and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of

estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close (reported in 3 Leon. 194), the defendant pleaded "that heretofore he himself brought an *ejectione firmæ* against the plaintiff of the same land in which the trespass is supposed to be done, and had judgment to recover; and demanded judgment if against, &c. It was moved that the bar was not good, because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another," &c.: *Quod curia concessit*. But as to the matter the court was clear that the bar was good. And, by Periam, whoever pleaded it, it was well pleaded; for, as by recovery in assize the freehold is bound, so by recovery in *ejectione firmæ* the possession is bound. And, by Anderson, a recovery in one *ejectione firmæ* is a bar in another; especially, as Periam said, if the party relieth upon the estoppel. And afterwards judgment was given that the plaintiff should be barred. This, it will be recollected, was an action of *ejectione firmæ*, and not an ejectment moulded and regulated by rules of court as it is at present. The court very properly distinguished there between what operates by way of bar to a future recovery for the same thing, and what by way of estoppel. That was the case of a mere recovery in *ejectione firmæ*, without title alleged; and the plaintiff might, in respect of [*355] possession or other varying circumstances of title, be well entitled to recover at one time and not be so at another. And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been on such issue joined solemnly found against them.

The authorities upon which a contrary doctrine has been endeavored to be maintained are the opinions of Lord Coke, as collected from his preface to his 8th Report, the resolution and doctrine in the case of *Ferrers*, 6 Coke 7 [ante 160], the case of *Inledon et al. v. Burgess*, 1 Shower 27, Comb, 166, to which may be added what passed in court in the case of *Basset v. Bennett* upon a motion for a new trial in this court in 1767, and the case of *Sir Frederick Evelyn v. Haynes* (Surrey summer assizes 1782 before Lord Mansfield), and the decision against the estoppel endeavored

to be maintained in *Kinnersley v. Orpe* (Douglass 517). As to the first of these supposed authorities on the subject (viz. Lord Coke's preface to the 8th Report, he there laments the multiplicity of suits in one and the same cause; whereon he says: "Often-times there are divers verdicts on the one side, and divers on the other, and yet the plaintiff or defendant can come to no finite end, nor can hold the possession in quiet, though it be often tried and adjudged for [*356] either party." And he adds: "In personal actions concerning debts, goods, and chattels, a recovery or bar in one action is a bar in another; and there is an end of the controversy. In real actions for freehold and inheritance, being of a higher and worthier nature and standing upon a greater variety of titles and difficulties in law, there could not be above two trials or at the most (and that very rarely) three; and in the meantime after one recovery the possession rested quiet." The complaint of Lord Coke is perhaps without much foundation, and it is certainly misapplied to the present subject. There must necessarily be a greater or less multiplicity of suits, according to the nature of the suit, and the subject on which it operates. The possession of land is changed much more frequently, and the right to it is capable of an infinitely greater number of modifications and interests, than the right to the freehold. The species of action accommodated to the right of possession, however acquired, and to injuries in whatever manner done thereto, must be of course more frequently called into use than other species of action which respect rights of property, either founded on entails or descents from different descriptions of ancestors, and the various acts of wrong by which such special rights are interrupted or destroyed. The judgment, which is the fruit of the action, can only follow the nature of the particular right claimed, and the injury complained of; and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same. In trespass, damages for an injury to possession are the only thing demanded by the declaration; the judgment can only give the plaintiff an ascertained right to his damages and the means of obtaining them; it concludes nothing upon the ulterior [*357] right of possession, much less of property, in the land (unless a question of that kind be raised by the plea and a traverse thereon), and does not even give him the means of obtaining that possession for the disturbance of which he has obtained damages. Neither, however, would a verdict and judgment in a real action operate by way of bar to future actions of trespass or

bring the parties "to the finite end" wished for by Lord Coke; because there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right (I mean a writ of right itself), a right of possession derived under the owner of the inheritance in fee simple, or those under whom he claims, which may enable a plaintiff in trespass to recover for an injury to his possession done by the very person in whose favor the absolute right of property shall have been so affirmed in a real action. A judgment therefore in each species of action is final only for its own proper purpose and object and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land than the other. What, therefore, Lord Coke says (that in personal actions concerning debts, goods, and effects, by way of distinction from other actions, a recovery in one [*358] action is a bar to another), is not true of personal actions *alone*, but is equally and universally true as to all actions whatsoever, *quoad* their subject matters. And, besides, this doctrine has no material bearing on the present question, which, it must be recollected, is: Whether an allegation on record upon which issue has been once taken and found is between the parties taking it and their privies conclusive according to the finding thereof so as to estop the parties respectively from again litigating that fact once so tried and found?

As to *Ferrer's Case*, 6 Coke 7, and which is to be found also reported in Cro. Eliz. 668 under the name of Sir Henry Ferrers and two others against Arden with a statement of the facts upon which the resolutions reported by Lord Coke are founded: it was an action of trover * * * [Here his lordship stated the facts as reported ante p. 159]. The effect of the resolutions in that case, as reported in 6 Coke 7, was: "that the law has provided greater safety and remedy for matters of freehold and inheritance than for debts and chattels; for there, once barred, always barred;" but that in matters of freehold the party may bring an action of

a higher nature, and therein try the matter again. Now, although it be true, that the same matter may be [*359] thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to bind, and as against all such parties as it is competent by law to bind. Upon the complaint made by Lord Coke in his preface to the 8th Report, and which is referred to and again repeated in this report, I have observed already, and again observe, that neither the one nor the other of these authorities at all touch the present question, which is that of the effect of a precise allegation made in pleading on record and tried and found between the parties.

The case of *Inclendon v. Burgess*, 1 W. & M., as reported in 1 Shower 27, Comb. 166, and Carth. 65, was an action for trespass for breaking a close; plea, a prescriptive right of common of turbary, &c.; replication traversing such prescription. The rejoinder by way of estoppel was, that in such a term one of the plaintiffs brought an action of trespass against the defendant wherein he pleaded the same prescription, and issue tried upon it and found for the defendant. And demurrer to the rejoinder. According to Shower the argument in favor of the demurrer against the estoppel was, that the parties were different, that there was another plaintiff who was not a party to the former suit. And finally they took exception to the declaration for not concluding against the peace of both kings. And on this last objection the court determined it, and not on the estoppel. The court according to Shower gave no judgment on the estoppel, but only said: "An estoppel upon a verdict goes a great way: issue in tail shall never falsify it; but if one man is estopped and he joins another with him, whether this shall avoid the estoppel is a *quaere*." The report in Carthew only says the court gave no opinion as to the matter in law, the estoppel, but [*360] judgment was given as to the objection taken to the declaration of *contra pacem domini regis*; and it does not appear to have been argued that it would not have been an estoppel if clear of other objections. In the report in Comberbach 166 the argument on the estoppel turned on there being another plaintiff joined. Lord Holt says, the meaning "of *Ferrer's Case* is, that it is a bar for the same individual thing; but here is a new cause of action: 13 Ed. IV, 2, 3, 4. There one trespass is a bar to another by way of estoppel; that is for taking a villein; but that is grounded perhaps on the reason of the favor of liberty:

7 Hen. VI, 8. In trespass, on an issue whether such an one died seized, a verdict was a bar to another action of trespass by way of estoppel, because there issue was joined on a matter in the realty. As to the section of Littleton before cited, the joining cannot privilege, as a release by one who afterwards joins with another; that release is pleadable to both. If this had been in a real action, where there might be summons and severance, there it is admitted it would be an estoppel." Dolben, justice, said: "*Ferrer's Case* is not like this; for here is a new cause of action, a new trespass; but in *Ferrer's Case* it was another action for the same trespass. And the court was certainly against Tremain." It must certainly be admitted that the present question in substance arose and might have been decided, but was not decided in the above case of *Incedon v. Burgess*, and that the decision proceeded on another ground. It appears that Holt, C.J., was aware of the case in 13 Ed. IV, 2, 3, 4, of the estoppel pleaded in the action of trespass for taking a villein; and also of the case in 7 Hen. VI, 8: but he certainly is not warranted by any thing to be found in the report of 13 Ed. IV in suggesting that the decision in that [*361] case was grounded on any reason in favor of liberty; nor as to 7 Hen. VI, 8, in saying that the estoppel in that case was sustained because there the issue (which was on the dying seized of a certain person) was joined on a matter in the realty.

The only question in the case 13 Ed. IV, was that which was made by Catesby, *i. e.*, upon the identity of the matter in issue. There, by partition, the villein who had been regardant to a manor was allotted with certain lands to one sister in gross, and the manor to the other sister. The ancestor of the villein had answered in the former suit, in which it had been alleged that he was a villein regardant, that he was free and not a villein in manner and form as alleged, and it was so found; and the effect of this finding as an estoppel, which was relied upon by the plaintiff in that suit (the son of the supposed villein in the former), was rested in argument not on the ground that it would be no estoppel if the issue were the same but on the ground of the issue being different; thereby admitting that it would have been an estoppel if the issue had been the same; and of that opinion Brian and the rest of the court seem to have been. The case in the Year-book, 7 Hen. VI, 8, 9, was this: Assize was brought against Popham and others, and the plaint was of mill with other lands and tenelements; and Popham said that assize ought not to be, for one J.

Popham was seized of the tenements now put in view and plaintiff in his demesne as of fee and died so seized, after whose death plaintiff claimed as by force of a lease made to him by the said J. Popham for term of life (whereas nothing passed by the deed) and demanded judgment; the plaintiff said that the father of the tenant had nothing but by the disseizin done to the plaintiff, and he made continual claim and [*362] could not enter for fear of death; to which the tenant said that at another time he brought trespass against the plaintiff, in which the plaintiff justified because the father of the tenant leased to him for life and the tenant said that his father died seized, and this was found for the tenant and he recovered damages, judgment if he shall be received to defeat this issue once found. Rolfe, who argued for the plaintiff that he should not be estopped, said, "he knew well that the plaintiff should not be received to say that the tenant's father did not die seized which had been tried in the writ of trespass; but to aver a thing which stands well with the first issue it seems he shall be received; because it does not follow that if he died seized, therefore he died seized of a good estate, but we have shown how he died seized." So that it seems clearly admitted by those who argued against the estoppel that the party was estopped as to the very issue found against him, but not as to other matters consistent therewith, that is consistent with the fact of dying seized, but avoiding the effect thereof in point of law (that is, avoiding its effect as a descent to toll an entry), by the disseizin, continual claim, and non-entry for fear of death as alleged. Cottesmore then says: "In writ of trespass of close broken, the issue trenches well enough in the realty; as if the defendant justify his entry by reason of inheritance which he has in the freehold; if this be traversed this shall be peremptory; and so it was in our case. Popham brought trespass, the then defendant pleaded in bar because of a lease made to him for life, and the plaintiff made title by descent of the inheritance, which was traversed and found with the plaintiff; which issue was merely in the realty. Wherefore it seems to me that the now plaintiff shall not be received now to disturb it." Martin says: "As my companion has said, the issue is as high in a writ of trespass, if taken in the [*363] realty, as in an assize; and if the present plaintiff in the writ of trespass had traversed the descent as he did and it has been found with the plaintiff and the plaintiff had also brought trespass, should he be permitted to avoid the descent by such descent as he has now done? I say not. No more shall he be received in this assize

where the plaint is of the same tenements." The case came on again, 7 Hen. VI, 20, when Martin said he thought the plaintiff should be estopped to avoid the descent, for this was found once against him with the now tenants, upon which they recovered their damages; and for this the descent, which was the cause of the judgment and upon which judgment was given, ought to be understood to be a good descent, and especially *per ent. primas*. And there was a like case, where a release was pleaded in bar, and the plaintiff said it was made by duress of imprisonment, and was afterwards nonsuit, and brought a new writ, and the release was again pleaded in bar; and he would have avoided the deed because it was made at a time when he was within age, and he was not received so to do: for that when he had said that the deed was made by duress, &c., he acknowledged it to be good in all points but that. Likewise in this case, when the descent is found against the plaintiff, it shall be holden as acknowledged by him; and if so, it is to be understood as well acknowledged, as at this time other matter was not shown. Cokain contended, that the continual claim was contrary to the issue; wherefore the averment could not be received. But Strangways (who was a judge) said it was not contrary, and that the averment might be received. And he thought that the inquest had only to inquire if J. Popham the father died seized in fact, which they had done; but the matter of law arising from the continual claim was not in charge to them; and that [*364] it seemed to him a marvelous thing to intend a matter upon a verdict necessarily of which, nevertheless, the inquest had not power to inquire." So that it seems clear that Strangways, who differed from Martin, thought the finding was an estoppel as far as it went. Brooke (tit. Estoppel 77) says, in his abridgement of this case, which was not decided: "*Optima opinio* was that it was a good estoppel," and concludes, "*sic vide*, issue tried in action of trespass and judgment given upon this is a good estoppel in a real action." By this case it appears to have been on all sides then admitted in argument, that an issue taken and found upon a traverse of a precise fact material to the right in question, in an action of trespass, is equally peremptory by way of conclusion as to that same fact, and upon the same right, between the same parties in an assize. The authorities, therefore, which Lord Holt referred to in *Inledon v. Burgess*, would, if further examined, have warranted the court (supposing the difference of parties to have opposed no objection to their so doing) in then giving a judgment upon the

point now in question, as well as upon the other point of *contra pacem*, &c., on which it was actually given.

As to the case of *Bassett v. Bennett*, in which a new trial was moved for, because a verdict was taken for the defendant, both on the general issue and on the plea of *liberum tenementum*; whereas there was only evidence to support the finding for the defendant on the general issue, and where the new trial is said to have been refused because the court held that the finding on the *liberum tenementum* would not prejudice the plaintiff, as a judgment in a possessory action was not conclusive on real rights. If it were indeed so laid down by the court, the doctrine must certainly be received with some degree [*365] of qualification and allowance. The plea would be conclusive that at the time of pleading the plea the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was found, from again alleging the contrary. But if not brought forward by plea as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found; but not *conclusive* between the parties, as an estoppel would be. In that case ~~the~~ ^{the} proper course would certainly have been for the judge at ~~the~~ ^{the} trial to have discharged the jury from finding any verdict on the plea of *liberum tenementum*, on which no evidence was given.

As to the other case relied upon by the plaintiff, of *Sir Frederick Evelyn v. Haynes*, which was a second action for obstructing a water-course, tried before Lord Mansfield upon a plea of not guilty, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same water-course was given in evidence; Lord Mansfield held very properly that the plaintiff had not obtained such a determination of his right by the former verdict as the law considered as conclusive. It could only be conclusive upon the right if it could have been used, and were actually used, in pleading by way of estoppel, which it could not be in that case: *First*, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel thereupon in second action; *Secondly*, it was not even pleaded by way of estoppel in the second action, but only offered as evidence on the general issue; and in order to be an estoppel, it must have been, as already observed, pleaded as such by apt averments. [*366]

As to the case of *Kinnersley v. Orpe*, Doug. 517, it is extraordinary that it should ever have been for a moment supposed

that there could be an estoppel in such a case. It was not pleaded as such; neither were the parties in the second suit the same with those in the first. The doubt seems rather to be whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action for penalties for fishing (under statute 5 Geo. III, c. 14, §§ 3, 4), against the defendant who was no party to the former action, than as to any conclusive effect it could have had if pleaded by way of estoppel, which, however, it was not in that case.

None of the cases, therefore, cited on the part of the plaintiff, negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies. The cases adverted to by Lord Holt, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities on the subject of protestation and estoppel, cited from Brooke Abr. Protestation, pl. 9, Fitzherbert Estoppel pl. 20, are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive that the husband and wife, the defendants in this case are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch; and consequently that the plaintiff ought to recover.

Judgment for the plaintiff.

JOHNSON STEEL STREET RAIL CO. v. WILLIAM WHARTON, JR. & CO., in U. S. Sup. Ct. March 5, 1894—152 U. S. 252, 14 S. Ct. 608.

Action for royalties. The affidavits of defense were held insufficient and judgment entered for plaintiff. Defendant sues error.

HARLAN, J. The question, upon the merits, which the defendant's affidavit of defense presented, was whether the girder guard rails manufactured and sold by it were covered by the Wharton patent and by the license granted by the agreement of November 24, 1885. But that precise question, it is admitted, was presented and determined in the former suit between the same parties. And we are to inquire, on this writ of error, whether the court below erred in holding that the judgment in the former suit concluded that question between the parties. The

learned counsel for the defendant insists that it did not, and bases his contention solely upon the ground that the former judgment was not, by reason of the limited amount involved, subject to review by this court.

Is it true that a defeated suitor in a court of general jurisdiction is at liberty, in a subsequent suit between himself and his adversary, in the same, or in any other court, to relitigate a matter directly put in issue and actually determined in the first suit, upon its appearing that the judgment in the first suit, by reason of the small amount in dispute, could not be reviewed by a court of appellate jurisdiction? Does the principle of *res judicata*, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority [*257] these questions must be answered in the negative. We have not been referred to, nor are we aware of, any adjudged case that would justify a different conclusion.

The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties in any subsequent suit in any court. The exceptions to this rule that are recognized in cases of judgments obtained by fraud or collusion have no application to the present suit.

In *Hopkins v. Lee*, 6 Wheat. 109, 113, it was held that a fact directly presented and determined by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. "In this," the court said, "there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. * * * On a reference to the proceedings at law, and in chancery, in the case

now before us, the court is satisfied that the question which arose on the trial of the action of covenant was precisely the same, if not exclusively so, (although that was not necessary,) as the one which had already been directly decided by the court of chancery." And in *Smith v. Kernochen*, 7 How. 198, 217: "The case, therefore, falls within the general rule, that a judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters when [*258] directly in question in another court." To the same effect are *Pennington v. Gibson*, 16 How. 65, 77; *Stockton v. Ford*, 18 How. 418; and *Lessee of Parish v. Ferris*, 2 Black 606, 609.

The whole subject was carefully considered in *Cromwell v. County of Sac*, 94 U. S. 351, 352, where it is said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

The doctrines of the latter case were applied in *Lumber Co. v. Buchtel*, 101 U. S. 638, 639, which case is like this in some respects. That was an action for the recovery of the last instalments of money due on a contract for the purchase of timber lands, the plaintiff having in a previous action against the same defendant obtained a judgment for the first instalment. In the first action the sole defense was that the defendant had been induced to make the contract of guaranty by false and fraudulent

representations. The same defense was made in the second action, and an additional one was interposed to the effect that the representations made as to the quantity of timber, and which induced the execution of [*259] the contract, amounted to a warranty upon which defendant could sue for damages. Both grounds of defense, relied on in the second action, were held to be concluded by the judgment in the prior action. In respect to the second ground, it was said: "The finding of the referee, upon which the judgment [in the first action] was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of a case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication."

In *Stout v. Lye*, 103 U. S. 66, 71, in which one of the questions was as to the conclusiveness of a judgment in a state court upon the same parties to a suit in the federal court—the two suits involving the same subject-matter, and the suit in the state court having been first commenced—this court, observing that the parties instituting the suit in the federal court, being represented in the state suit, could not deprive the latter court of the jurisdiction it had acquired, said: "The two suits related to the same subject matter, and were in fact pending at the same time in two courts of concurrent jurisdiction. The parties also were, in legal effect, the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring a separate suit the Stouts voluntarily took the risk of getting a decision in the Circuit Court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matter now in question, and it concluded the parties and those in privity with them, not only as to every matter which was offered and [*260] received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U. S. 351, 352. It is true the mortgagor did not set up as a de-

fense that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defenses, and so are his privies."

In all of these cases, it will be observed, the question considered was as to the effect to be given by the court of original jurisdiction to the judgment in a previous case between the same parties or their representatives, and involving the same matters brought up in a subsequent suit. In no one of them is there a suggestion that the determination of that question by the court to which it was presented should be controlled by the inquiry whether the judgment in the first action could be reviewed upon appeal or writ of error.

The counsel for the plaintiff in error, in support of his position, referred to the clause of the constitution declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish, and to the clause providing that the judicial power of the United States shall extend to *all* cases in law or equity mentioned in that instrument. But, except in the cases specially enumerated in the constitution and of which this court may take cognizance, without an enabling act of Congress, the distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government. And it has never been supposed that Congress, when making this distribution, intended to change or modify the general rule, having its foundation in a wise public policy, and deeply imbedded in the jurisprudence of all civilized countries, that the final judgment of a court—at least, one of superior jurisdiction—competent under the law of its creation to deal with the parties and the subject-matter, and having acquired jurisdiction of the parties, [*261] concludes those parties and their privies, in respect to every matter put in issue by the pleadings and determined by such court. This rule, so essential to an orderly and effective administration of justice, would lose much of its value if it were held to be inapplicable to those judgments in the Circuit Courts of the United States which, by reason of the limited amount involved, could not be reviewed by this court.

The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment—whatever the nature of the question

decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit. The existence or non-existence of a right, in either party, to have the judgment in the prior suit reexamined, upon appeal or writ of error, cannot, in any case, control this inquiry. Nor can the possibility that a party may legitimately or properly divide his causes of action, so as to have the matter in dispute between him and his adversary adjudged in a suit that cannot, after judgment, and by reason of the limited amount involved, be carried to a higher court, affect the application of the general rule. Whatever mischiefs or injustice may result from such a condition of things, must be remedied by legislation regulating the jurisdiction of the courts, and prescribing the rules of evidence applicable to judgments. Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction.

We are of opinion that the question whether the rails manufactured by the Johnson Company were covered by the Wharton patent, having been made and determined in the prior action between the same parties—which judgment remains in full force—could not be relitigated in this subsequent action.

There is no error in the judgment, and it is

Affirmed.

WATTS v. WATTS, in Mass. Sup. Jud. Ct., Feb. 26, 1894, 160 Mass. 464, 36 N. E. 479, 39 Am. St. 509, 32 L. R. A. 187.

LIBEL, for divorce on the ground of adultery, alleged to have been committed with one Ford. On the trial it was either proved or admitted that the parties were legally married, and that they lived together as husband and wife at Rockland until June 4, 1892. At that time the libellee committed adultery with Ford, and was discovered by the libellant, who thereupon ejected her from his house. On June 6, 1892, the present libellee filed a petition in the probate court for separate support and maintenance. At the hearing, the husband appeared and defended against it, but offered no evidence of the wife's adultery. On August 22, 1892, the probate court entered a decree in favor of the libellant, which recited that she, "for justifiable cause, was actually living

apart from her said husband." No appeal^o was taken from this decree, and at the time of the filing of this libel, and at the hearing thereon, it was in full force. The libellant asked the judge to rule that, as matter of law, he was entitled to a decree, but the judge refused to so rule, and ruled that the decree of the probate court was a bar to this libel, and ordered it dismissed. The libellant alleged exceptions. [*465]

KNOWLTON, J. In regard to subjects of which the probate court has jurisdiction, and upon parties brought within its jurisdiction, a decree of that court, like a judgment of other courts, is conclusive. *Laughton v. Atkins*, 1 Pick. 535; *Pierce v. Prescott*, 128 Mass. 140; *McKim v. Doane*, 137 Mass. 195; *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765.

The decree introduced at the trial, being between the same parties as those in the present action, is binding and conclusive upon them in this suit in regard to all matters shown to have been put in issue or to have been necessarily involved in the former suit, and actually tried and determined in it. In regard to matters not then in controversy and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them according to the truth if they are subsequently controverted in a different case. *Burlen v. Shannon*, 14 Gray, 433, 437; *Thurston v. Thurston*, 99 Mass. 39. *Burlen v. Shannon*, 99 Mass. 200; *Lea v. Lea*, 99 Mass. 493, 496; *Hawks v. Truesdell*, 99 Mass. 557; *Commonwealth v. Evans*, 101 Mass. 25; *Lewis v. Lewis*, 106 Mass. 309; *Foye v. Patch*, 132 Mass. 105, 111; *Cromwell v. Sac*, 94 U. S. 351. It would be a harsh and oppressive rule which should make it necessary for one sued on a trifling claim to resist it, and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it. For the purpose of defending that suit, he would have his day in court but once, and if he chose to let the case go by default, or with a trial upon some of the defenses which might be made and not upon others, he would be obliged forever after to hold his peace. But a plaintiff can claim no more than to be

given what he asks in his writ. He cannot justly complain that the defendant has not seen fit to set up [*466] defenses and raise issues for the purpose of enabling him to settle facts for future possible controversies. In subsequent proceedings which are independent of the original suit, the judgment in that suit is conclusive as evidence, or may be pleaded as an estoppel only as to those matters which were put in issue and determined; but it is not necessary that these should be particularly mentioned in the pleadings if they are involved in the issue made up, and if the case is determined upon the trial of that issue. The bill of exceptions in this case shows nothing in regard to the pleadings in the probate court, further than that there was a petition brought under the Pub. Sts. c. 147, § 33, and that the respondent appeared and defended against it. It appears that no evidence was offered of the act of adultery on June 4, 1892, and we infer that it was not set up in answer to the petition. We must assume that the respondent's pleading was a general denial. Was the question whether the petitioner had committed adultery, as now appears, necessarily involved in the issue made up by an affirmation and denial that she was living apart from her husband for justifiable cause? The grounds of the decree do not appear. Could such a decree have been made upon any possible state of facts if the petitioner had been known to have committed adultery on June 4, 1892? If so, the decree could not be held to be a bar to a divorce, unless the only facts which would render the decree possible are such as would of themselves preclude the libellant from obtaining a divorce. The decision that a wife is living apart from her husband for a justifiable cause, made upon a hearing between them on the general issue, conclusively shows that she has not utterly deserted him. *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765. Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it were known that the wife was guilty of adultery of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when he ejected her from his house, and then had asked her to return to his home and had offered to forgive the adultery if she would [*467] come back, she would have been justified in refusing to return on the ground that she had reason to fear great

injury from his cruelty if she continued to live with him. If such facts appeared the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery, and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried. * * *

It follows that the judgment of the probate court is not conclusive against the libellant in the present action, and there must be a new trial. *Exceptions sustained.*

KITSON v. FARWELL, in Ill. Sup. Ct., March 29, 1890—132 Ill. 327, 23 N. E. 1024.

Motion by Samuel Kitson in the county court of Cook Co. to be discharged from imprisonment on execution on a judgment in favor of J. V. Farwell et al. The motion was opposed on the ground that malice was the gist of the cause for which the judgment was rendered. From an order denying the motion Kitson appealed to the circuit court of Cook Co. A jury being there impaneled to try the question, the petitioner offered evidence to prove that the judgment under which he was imprisoned was for a debt contracted *bona fide*. Thereupon the respondents offered in evidence the declaration and files in the original action, and the court refused to hear the petitioner's evidence, on the ground that the declaration and files in the original action showed that the question now made was then tried and found against the petitioner. The circuit court then entered an order affirming the judgment of the county court. On appeal to the appellate court this judgment was affirmed, and the petitioner again appeals.

SHOPE, C. J. * * * [*336] The declaration offered in evidence contained three counts, to which the plea of the general issue was filed, and on the trial of the issue thus made a general verdict was rendered finding the defendant guilty and assessing the plaintiffs' damages. If it be conceded, which may be done for the purposes of this case, that the first count of the declaration states a good cause of action in case, as for deceit, it can not be said, under the rulings of this court, that the second and third counts present a good cause of action. * * * [*340] The

judgment necessarily follows the nature of the right claimed in the declaration, or the injury complained of, and, generally speaking, can conclude nothing beyond such right or injury. As we have seen, the judgment is not evidence of any matter which is only to be inferred therefrom by argument, and which probably did, but might or might not, constitute the true ground of recovery. If the rule were otherwise, it would operate harshly and unjustly; for to admit a presumption that a fact is established by the judgment, and not allow that assumption to be rebutted by proof that it is without foundation, would be to reverse the rule applicable to all presumptions of fact. The authorities are, therefore, that a judgment is conclusive only of what it necessarily and directly decides. It is manifest, that it by no means follows that by the judgment in this case the defendant therein was found guilty of having made any false representations, or of having practiced any deceit, or resorted to any artifice, to obtain possession of the goods in the declaration mentioned, for which an action on the case, as for deceit, would lie. Nor does it militate against this conclusion that the judgment, if rendered under the second and third counts, would be upon an immaterial issue. For some purposes the judgment would be referable to the good count in the declaration, as, upon motion in arrest, or upon error; but where the doctrine of *res judicata* is sought to be applied, it must conclusively appear that the matter was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar. It may also be that the matters set up in the second and third counts of the declaration, by means of which it is alleged the petitioner obtained the credit, were in a sense immoral; but as we have already seen, they formed no proper basis for a recovery in the action [*341] in which the judgment was obtained. It may also be true, that if the first count had not been in the declaration, the judgment might, on motion, have been arrested; that it may have been the duty of the defendant to have demurred, as suggested by counsel, and of the court to have sustained the same, to said second and third counts; but that consideration can not affect the question being considered. It is apparent that the jury may just as well have found for the plaintiffs in that action, upon evidence tending to support the second and third counts, only, which would form no basis for or right of recovery for fraud or injury committed by the petitioner in that action, as upon the first count. The finding of the jury, we may

argue, was predicated upon the allegation of the first count of the declaration; but it is manifest, under the rule, that will not suffice. If predicated upon the second and third counts of the declaration, alone, it was by no means such as would have authorized a recovery in the suit where malice is the gist of the action.

But it is said that no motion in arrest was entered by the defendant because of the defect in the declaration. Manifestly, such motion would have been unavailing had it been entered while the first count remained.

It follows, that we are of opinion that this judgment, under the pleadings, was not necessarily conclusive of the question as to whether malice was the gist of the action. * * *

Judgment reversed.

AETNA LIFE INS. CO., v. BOARD OF COM'RS. of HAMILTON COUNTY, KAN., in U. S. Circuit Ct. of App., Eighth Circuit, Aug. 4, 1902—54 C. C. A. 468, 117 Fed. 82.

SANBORN, C. J. The defenses interposed and the issues raised in this case are identical with those presented in the former action, in which judgment was rendered for the defendant upon coupons cut from the same bonds as were those in this suit. The only new allegation in this action is that the plaintiff was induced to buy the bonds and coupons by the certificate of the county clerk that the indebtedness of the county, including that evidenced by the bonds in question, did not exceed \$80,000; and this averment is immaterial, because the county clerk had no statutory or other authority to make such a certificate for the county. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 282, 30 C. C. A. 38, 48, 49 L. R. A. 534. The fact that the issues of demand and refusal of payment in the two actions differ because they must have been made at different times, since the coupons in this action were not due until after the former action was commenced, is [*84] of no consequence, because a demand and refusal were not essential to the maintenance of either action, and the legal presumption is that the former judgment was based on a sufficient defense, and not upon an immaterial issue. *Speer v. Board*, 88 Fed. 749, 753, 754, 32 C. C. A. 101, 105; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 556, 104 Fed. 306, 321. The only real question in the case, therefore, is this: Is a former judgment upon a general finding in favor of the defendant which does not disclose which one of several defenses was sustained, an estoppel of the plaintiff therein

from maintaining a second action upon different causes of action against the same defendant in which the same defenses are interposed and the same issues are presented that were made in the earlier action? Counsel for the plaintiff argue with great force and persuasiveness that this question must be answered in the negative. They plant themselves upon the declaration of the supreme court in *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214, that "it is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." They cite in support of their contention *Cromwell v. Sac. Co.*, 94 U. S. 351, 24 L. Ed. 195; *Board v. Sutliff*, 38 C. A. 167, 97 Fed. 270; *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Railway Co. v. Leathe*, 84 Fed. 103, 28 C. C. A. 279; and *Bank v. Williams* (Wash.) 63 Pac. 511,—and they insist that, because the general finding and judgment in the first action do not indicate which one of the several defenses pleaded in both actions was litigated, nor upon which one the judgment was based, that judgment cannot constitute an estoppel upon any one of these defenses or issues, and that every defense there presented may be again litigated in this action, unless the defendant proves by extrinsic evidence which one or more of them were actually litigated and determined in the former suit. The propositions that there is nothing in the record in the former action nor in the pleadings in this action that discloses, which one of the several defenses interposed in both actions was sustained in the earlier one, and that, if it is essential to the estoppel in this case to determine this fact, this judgment cannot stand, must be con-

ceded. But how is the determination of the question whether one or another of these defenses was sustained in the earlier action essential to the establishment of the estoppel? The pleadings upon which the judgment [*85] stands show that the same issues are made and that the same defenses are interposed here that were made and interposed in the former action. The judgment in the earlier action is conclusive evidence that at least one of these defenses was sustained, and that at least one of these issues was determined in favor of the defendant. By that judgment the plaintiff is estopped from again litigating that defense or that issue, and an estoppel from litigating one of many defenses or issues that are equally fatal to his case would seem to be as conclusive and as fatal as an estoppel from litigating them all. The quotation from *Russell v. Place*, and the general declarations of the courts in the other cases cited, must be read in the light of the facts then under consideration by those courts. In that class of cases in which the second action presents a material issue or matter which may not have been raised, litigated, and decided in the former action it is undoubtedly essential to the estoppel to show what issue was litigated and decided and what question was determined in the earlier case, in order to determine whether or not the issue there determined embraced the matter in litigation in the second action. But where, as in the case at bar, the pleadings conclusively show that all the defenses made and all the issues joined are identical in the two actions, it is difficult to perceive how it can make any difference to which one of the defenses or issues the estoppel applies, because the mere fact that it does apply to one defense and to one issue is as fatal to the maintenance of the second action as it would be if it applied to all. When the opinions which have been cited by counsel for the plaintiff are carefully read, analyzed, and considered, they will not be found to be inconsistent with this distinction. The decisions which they cite all fall within the first class of cases to which we have adverted and fail to rule the question which is presented in the case in hand.

In *Russell v. Place*, 94 U. S. 606, 609, 24 L. Ed. 214, the question was whether a judgment at law against a defendant for damages for the infringement of a patent which contained two claims estopped the defendant in a subsequent suit against it for an injunction against the infringement from litigating the issues of the novelty, the prior public use, and the infringement of the invention, which had been pleaded in the action at law. The

court answered this question in the negative, because there were two claims to the patent, one of which might be valid and the other void, and the judgment at law did not disclose whether it rested on a finding that both or only one of the claims was infringed, and, if but one, it did not show which one. In other words, the judgment in the action at law might have been founded upon the determination of an issue which would not have entitled the complainant to an injunction restraining the defendant from the use of both of the inventions described in the two claims of the patent.

In *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550, the action was brought upon a contract to pay three-fourths of the fuel saved by the use of Sickles' cut-off on a steamboat for a certain length of time. The plaintiff, for the purpose of estopping the defendant from questioning the validity of this contract, offered in evidence the record of a former judgment in an action of like character for the fuel saved during an earlier term, together with the testimony of witnesses that the contract [*86] involved in the earlier action was the same as that upon which the second action was founded. The supreme court decided that in this state of the case it was competent for the defendant to introduce the testimony of witnesses to prove that the contract involved in the former action was in writing, while that in question in the latter suit was a parol agreement, and therefore void under the statute of frauds. In other words, the defendant was permitted to show that the former judgment was not an estoppel, because it had a new defense in the second action, which was not pleaded, tried, or ruled upon in the former case.

In *Cromwell v. Sac Co.*, 94 U. S. 351, 359, 24 L. Ed. 195, the findings in the former action upon which the judgment for the defendant was based disclosed the fact that the bonds and the coupons that had been cut from them upon which the action was based were fraudulently issued, and they contained no finding that the holder of the bonds paid value for them. The supreme court held that a judgment upon this finding did not estop the holder of the bonds from maintaining a second action on other coupons taken from bonds of the same issue upon proof that he had purchased and paid value for them in good faith in reliance upon the recitals which they contained, before their maturity. In other words, it held that the earlier judgment did not estop the plaintiff from maintaining a second action upon different causes of action, and upon a state of facts which presented an issue of

law and of fact that was not raised or litigated in the earlier suit. To the same effect is the decision in *Board v. Sutliff*, 97 Fed. 270, 274, 38 C. C. A. 167, 171.

In *Nesbit v. Independent Dist.*, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562, the converse of this proposition is maintained. It is there held that the litigation and defeat, in a prior action upon coupons by a purchaser for value without notice, of the defense that the debt of the district exceeded its constitutional limit when the bonds were issued did not estop the district in a subsequent action upon the bonds themselves from maintaining the defense that the debt was in excess of the constitutional limit against the same plaintiff who was there proved to have received notice of this fact before he bought the bonds.

In the case of *Railway Co. v. Leathe*, 84 Fed. 103, 105, 28 C. C. A. 279-281, holds only that, where one of several defenses to a prior suit was that the defendant had assumed and was liable for the debts of a railroad company, and that suit was dismissed, the judgment of dismissal did not estop the defendant from litigating the question of his liability in a subsequent action against him, for the reason that the record of the former suit did not show that all the defenses there pleaded were sustained, and hence did not establish the fact that the court had decided that the defendant had assumed and had become liable for the debt of the railroad company.

In *Bank v. Williams* (Wash.) 63 Pac. 511, the holder of bonds filed a petition for a mandate to compel the county commissioners of Pacific county and the school district to levy a tax to pay the interest upon the bonds of the district. The school district answered (1) that its debt was in excess of its constitutional limit when the bonds were [*87] issued; (2) that the bonds were fraudulently issued; (3) that since the issue of the bonds a large portion of the district had been cut off and made a part of other districts; and (4) that the moneys then in the hands of the county treasurer were not applicable to the payment of the interest on the bonds. The petitioner demurred to this answer. The court overruled the demurrer, and dismissed the petition. Afterwards the plaintiff brought an action against the same defendants upon the coupons cut from these bonds, and the defendants answered that the plaintiff was estopped from maintaining the second action by the record and judgment in the first. To this the plaintiff replied that the judgment in the former action was rendered on the sole ground that none of the moneys then in the hands of

the county treasurer were applicable to the payment of the bonds, and that no other defense or issue was decided or determined in that case. He established the truth of the averments of this reply by parol testimony. The court held that in this state of facts the former judgment did not estop the plaintiff from litigating the three defenses which were not tried or determined in the earlier action, and sustained the judgment below for the plaintiff.

This brief analysis of the controlling facts of the cases upon which the plaintiff places its chief reliance discloses the fact that in every one of them the record was such that the former judgment either was or might have been rendered without a litigation and decision of the crucial and determinative issue presented in the second action. In every case cited the second action presented some controlling issue, which either was not or might not have been litigated and decided in the former suit. It is not so in the case in hand. This case is presented upon the petition, answer, and reply. There is no averment or statement in any of these pleadings that any issue or defense, any right, question, matter, or fact, that is or can be determinative of this action, was not raised, presented, litigated, and decided in the former suit. On the other hand, these pleadings admit that the same issues have been raised, that the same defenses have been interposed, in both actions, that in the former action evidence was introduced in support of all the allegations of the petition, that the earlier action was duly tried, and that a judgment was rendered for defendant upon due consideration. It is true that the defendant interposed several defenses to that action, and that it is impossible to determine from the pleadings which one was sustained. Nor is that fact material. One of the defenses which the county has presented in both of the actions was necessarily sustained in the earlier suit, and all the bonds from which the coupons in both actions were taken and the coupons themselves were held to be void in view of that defense. The doctrine of *res adjudicata* is that the same parties are conclusively estopped from again litigating any issue, question, right, or matter which they have once lawfully raised and litigated, and which the court has once decided. This second action upon coupons cut from the same bonds as those involved in the first action cannot be sustained without a second litigation and an overruling of the very defense which the court sustained in the former action. Concede that all the other issues and defenses may be tried and decided in this suit without again litigating any issue presented before, yet there re-

mains that one defense which was sustained [*88] in the former action which was fatal to the plaintiff's case then, and which is fatal to it now, unless the plaintiff can again in this action raise the issue which that defense presents, and can here obtain a decision and judgment upon it which shall be the converse of those which were rendered in the former action. This it may not do. The very purpose of the establishment and maintenance of civil courts is to finally determine controversies between the parties who present them. If the decisions of these courts upon questions lawfully submitted to and tried by them were not conclusive, if the courts left the questions which they decided open to repeated litigation and decision, their usefulness would immediately cease, and litigants would no longer invoke their aid to protect their rights or redress their wrongs. It is essential to the peace and repose—nay, it is essential to the very existence—of civilized society that the decisions and judgments of the courts invoked for the protection of the rights of person and of property should be final and conclusive between the parties and their privies upon every question of fact and of law which they properly put in issue and the courts actually try and decide. The maintenance and application of this salutary principle have evoked these established rules for the administration of estoppel by judgment:

When the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.

When the second suit is upon a different cause of action, but between the same parties, as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided. *Linton v. Insurance Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57; *Commissioners v. Platt*, 79 Fed. 567, 571, 25 C. C. A. 87, 91, 49 U. S. App. 216, 223; *Board v. Sutliff*, 38 C. C. A. 167, 171, 97 Fed. 270, 274; *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Southern Minnesota Ry Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249.

Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an

estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. *Russell v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214.

A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second suit against the same defendant upon different causes of action in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless the party denying the estoppel makes it appear by pleading or proof that some (*89] new and material issue, question, or matter is involved in the second action, which was not or may not have been litigated or decided in the first action. *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 236, 8 Sup. Ct. 495, 31 L. Ed. 411; *Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 46 C. C. A. 639, 644, 107 Fed. 781, 786, 787.

Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, question, or matter is or may be involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon that defense which was there rendered.

The pleadings in this case leave no avenue of escape from the conclusion that at least one of the defenses pleaded in this action was actually and necessarily litigated and sustained in the former action between these parties, wherein there was a judgment for the defendant. That defense proved fatal to the validity of the bonds and coupons in that earlier action. In the absence of pleading or proof that this action presents some determining issue which might not have been litigated and decided in the former action, the defense which was there sustained is as conclusively established in this action by the judgment in that action, and is as fatal here as it was in the earlier suit.

The judgment below must be affirmed, and it is so ordered.

Scope of the Prior Court's Jurisdiction.

SHURTE v. FLETCHER, Michigan Supreme Court, Dec. 9th, 1896,
111 Mich. 84, 69 N. W. 233.

Bill by Wm. Shurte against Fletcher and others praying that certain deeds of adjustment made by and between him and the other heirs of his father be annulled for fraud and that the land of the estate be partitioned and his share decreed to him in severalty, with prayer for general relief. The defendants answered that the complainant had filed a petition in the probate court praying that an administrator of said estate be appointed; that the other heirs appeared and opposed the granting of said letters on the ground that the estate has been settled by said agreements; that the probate court so decided, and denied the petition; and that by such decision the matters now attempted to be litigated are *res judicata*. The trial court found the averments in the bill true and decreed the relief prayed for. The defendants appeal.

MOORE, J. * * * It is urged that the court in chancery ought not to take jurisdiction of this case because it is *res judicata*. This claim is based upon the fact that, subsequent to the execution of Exhibits A and B, the complainant petitioned the probate judge for the appointment of an administrator; that a hearing was had, one witness sworn, and Exhibits A, B, and C offered in evidence; that, upon the hearing, the probate judge refused to appoint an administrator for want of jurisdiction, and because the estate had been settled. We do not think the claim of *res judicata* can be sustained. There was nothing in the pleadings to indicate that the probate judge was called upon to construe the effect of the alleged settlement. [*99] The probate court would not have power to decree a specific performance of the agreement made by the parties, if it was a valid one, and they refused to carry it out; neither would it have the power to set aside the agreement and cancel it, if it was invalid. See *Perkins v. Oliver*, 110 Mich. 402; also, *Bush v. Merriman*, 87 Mich. 260.

The decree of the court below is affirmed, with costs.

LONG, C. J., MONTGOMERY and HOOKER, JJ., concurred.
GRANT, J., did not sit.

Action for Damages or Rescission After Recovery of Price.

JORDAHL v. BERRY, in Minn. Sup. Ct., April 29, 1898—72 Minn. 119, 75 N. W. 10 45 L. R. A. 541, 71 Am. St. Rep. 469.

MITCHELL, J. This was an action to recover \$5,000 damages for malpractice by the defendants in the performance for plaintiff of professional services as physicians and surgeons. After the action was commenced and at issue, each of the defendants brought an action against the plaintiff, in justice's court, to recover the value of his services, alleged in one case to be some \$22, and in the other \$7. The present plaintiff neither answered nor appeared in those actions, and the present defendants, respectively, recovered judgment for the full amounts claimed. They then set up these judgments, by supplemental answers, as a bar or estoppel to plaintiff's recovery in this action. The plaintiff demurred on the ground that the answers did not state facts constituting a defense. From an order sustaining the demurrers, the defendants appealed.

While the doctrine of estoppel by a former adjudication is as old as the law, few questions have given rise of late years to more discussion [*121] and conflict of opinion than the applicability of the doctrine to a state of facts the same or similar to that presented by this case.

In *Bellinger v. Craigie*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113, and *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, it was held that a judgment in justice's court in favor of a surgeon for professional services was a bar to any action against him for malpractice in the performance of such services. In the first and last of these cases the defendants appeared and answered, but afterwards withdrew their answers. In the other the defendant did not answer, but consented in writing to the entry of the judgment. We do not refer to this as distinguishing in principle those cases from the present, but it may have had some influence upon their decision. See *Bascom v. Manning*, 52 N. H. 132. Neither do we lay any stress on the fact that an action for services is brought in justice's court, except so far as it illustrates the inconvenience and practical injustice of what we may call the New York doctrine. In *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570, the court applied the same rule to a state of facts not differing in principle.

A directly opposite conclusion was arrived at upon the same state of facts in *Ressequie v. Byers*, 52 Wis. 650, 9. N. W. 779, 38 Am. Rep. 775; *Lawson v. Conway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. Rep. 17; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; and *Sykes v. Bonner*, 1 Cin. R. 464,—in most of which cases the courts reviewed the New York cases, and refused to follow them.

This conflict of opinion among the courts gave rise to an extended and somewhat energetic dispute among text writers.

Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. Bigelow, Estop. (5th Ed.) 174 et seq. Mr. Van Fleet takes the same side of the question. Van Fleet, Former Adj. § 168 et seq. Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York, as being much better supported by legal reason, and the best considerations of convenience and justice. 2 Black, Judgm. § 769. Mr. Browne, in his note to *Ressequie v. Byers*, *supra*, in 38 Am. Rep. 778, says, of the New York doctrine, that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are [*122] odious at best, and are founded on a technicality, and probably promote more injustice than they prevent.

On the other side, Mr. Herman urges with great earnestness that the New York doctrine is sound, and that the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res adjudicata* is founded. Herman, Estop. § 231 et seq. We do not find that Mr. Freeman, in his work on Judgments, anywhere discusses this precise question; but in view of the fact that, in support of certain general propositions laid down in his text, he cites the New York cases without any intimation of disapproval, it may perhaps be inferred that he approves of their doctrine. See Freeman Judgm. § 282.

On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea.

The foundation principle upon which the doctrine of *res adjudicata* rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been

judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate. Rightly understood, no doctrine of the law is more in accord with justice and public policy. The difficulty which has always confronted the courts is to determine the extent of the application of that doctrine. Where an issue has been actually litigated and determined on its merits, there can be no doubt, upon either reason or authority, that the judgment is, as between the parties and their privies, conclusive in relation to that point in any other suit, though the purpose and subject-matter of the two suits be different. The difficulty is to determine what points were in issue and determined by the judgment, or, rather, what issues were necessarily involved in the judgment, although not directly and expressly made and litigated.

The American authorities seem to have generally gone somewhat [*123] further in applying the doctrine of *res adjudicata* in that respect than the English courts, whose general tendency is to confine the estoppel of a judgment to matters actually disputed.

Looking at the subject from a practical standpoint, there is certainly great danger of working injustice, unless great caution is used, in holding that a judgment is an estoppel upon a certain point, on the ground that it was necessarily involved in the judgment, although the issue was not expressly tendered and litigated. Frequently one learned in the law can reason out, to his satisfaction, that a particular point was necessarily involved in a judgment, when such a thing would never occur to the ordinary layman. The present case is an illustration of the fact. Whatever conclusion hard logic would require, every one knows that, as a matter of fact, the question of defendants' malpractice was not determined in their suits for services, and that the judgments were in fact for the value of the services, irrespective of, and disconnected from, any claim for malpractice.

The inconvenience of the New York rule, and its liability to work injustice, is further illustrated by the present case. It furnishes an opportunity to create an estoppel by what may not unfairly be called a snap judgment. It is perhaps not uncharitable to surmise that this may have been the very object of defendants in bringing their actions in justice court. But, this aside, if plaintiff had appeared and defended those actions, he would have been put to the alternative of alleging the malpractice as a mere

defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered \$100, the limit of the justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claims of the defendants for services were less than \$15, the issue, involving a claim of \$5,000, would have been conclusively determined by the judgment of the justice, from which neither party could appeal on facts. We concede that such considerations are not, in themselves, of any force, except as illustrating the inconvenience of such a rule; but where it is open to the [*124] court, upon principle, to choose between two rules, they are entitled to weight.

After starting out with the conceded proposition that a judgment is conclusive of every fact necessary to uphold it, whether the final determination is the result of litigation, or of a default of one of the parties, the reasoning of those who advocate the New York doctrine may be all summed up as follows: If the services were of value, they could not have been useless; and, if of use, they could not have been harmful; and, if not harmful, there could not have been malpractice in the performance of them; therefore a judgment that the services were of value necessarily involved a determination that they were properly performed; and that such an adjudication is necessarily inconsistent with the existence of a claim by the patient for damages for malpractice in their performance. See *Blair v. Bartlett*, *supra*, and *Dunham v. Bower*, *supra*.

We cannot avoid feeling that this line of reasoning is more technical and theoretical than practical. And, even if technically sound, the doctrine of many of the adjudicated cases certainly does not conform to it, as is illustrated in numerous suits between vendor and vendee and employer and employee. The decisions are too numerous to require citation, to the effect that in the case of a sale of personal property, with a warranty of its quality, a judgment in favor of the vendor for the purchase money (the breach of warranty not having been interposed by way of defense or counter-claim) is no bar to an action by the vendor for damages for breach of the warranty. We fail to see why the reasoning adopted in favor of the New York doctrine is not equally applicable to such a case; for, if the property was not as warranted, the contract was broken, and the vendor was never entitled to

the full purchase price. It is no sufficient answer to say that the warranty was itself a contract collateral to the contract of sale. There is but one contract, and the warranty is one of its terms, and not a separate and independent contract. *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1.

There are also numerous cases holding that a recovery by an employee on a complaint for services rendered will not estop the defendant employer from recovering damages sustained by him through [*125] the negligent or unskillful performance of such services; such negligent acts not having been set up or litigated in the action for the services. The following are a few of the many cases which might be cited to that effect: *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbridge*, 15 M. & W. 598; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Davenport v. Hubbard*, 46 Vt. 200, 14 Am. Rep. 620; *Mimnaugh v. Parthin*, 67 Mich. 391, 34 N. W. 717; *Robinson v. Crowninshield*, 1 N. H. 76. Mr. Freeman himself lays down this doctrine, and cites some of those cases in its support. Freeman, Judgm. § 282.

In *Schwinger v. Raymond*, 83 N. Y. 192, 38 Am. Rep. 415, the New York court of appeals held the same thing. It is true, the court attempted to distinguish that case from *Dunham v. Bower*, *supra*, on the ground that in the latter the carrier had never performed his contract by transporting and delivering the goods, which were wholly destroyed en route, while in the former the carrier had performed by transporting and delivering the goods, which were only damaged en route. But it is respectfully suggested that the distinction is untenable on principle. In both cases the contract was safely to carry and deliver the property, and in neither was the contract performed. The difference in breach was one of degree merely.

The reasoning adopted in support of the New York doctrine is equally applicable to all these cases; for it could be argued that an adjudication that the employee was entitled to recover for his services necessarily implied that he had performed them properly, and according to the contract, which would be inconsistent with the existence of a claim in favor of the employer for damages for the improper or negligent performance of the services.

The reasoning usually adopted in opposition to the New York doctrine is substantially as follows: That negligence or want of skill in the performance of services, resulting in damages to the employer, creates an affirmative cause of action in his favor, the

moment the negligent or unskillful act is committed; that this cause of action, like every other one, carries with it the right of the party to sue on it and put it into judgment in his own way; that one cause of action cannot, in and of itself, when merged in judgment, carry with it another cause of action, however closely the two may be connected; that, where a defendant has a cross claim, [*126] he may set it up as a defense or counterclaim, but is not bound to do so, although the two causes of action grow out of the same contract.

It would be impracticable, as well as unsafe, to define the precise limits of this doctrine, or to lay down any rule of universal application; but, as applied to the present case (which was one in tort, arising on contract), and others strictly analogous, we have concluded that this doctrine is permissible on principle, and much the safer, more convenient, and more equitable in practice.

Order affirmed.

Accord: Conly v. Scanlon (1906), Iowa, 109 N. W. 300; *Lawson v. Conway* (1892), 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627; 38 Am. St. Rep. 17.

SCHWAN v. KELLY, in Pa. Sup. Ct., Jan. 6, 1896—173 Pa. St. 65, 33 Atl. 1107.

Bill by Schwan and others to have rescision of a mortgage and other relief. Decree for defendants and plaintiffs appeal.

FELL, J. The vendees in a contract for the purchase of land, claiming the right to rescind on the ground of fraud, tendered a deed of reconveyance and demanded the repayment of the part of the purchase money which they had paid. The right was denied by the vendors, who then caused a *scire facias* to issue on the mortgage which had been given them by the vendees for the unpaid balance of the purchase money. At the trial no defense was interposed, and under the judgment obtained the property was sold by the sheriff, and purchased by the plaintiffs in that action. A bill subsequently filed by the vendees to rescind the contract and to require the return of the purchase money was dismissed by the court of common pleas on the ground that the judgment on the *scire facias* was an adjudication of all matters set up by the bill, and a bar to the proceedings.

The rule that what has been judicially determined shall not again be made the subject of controversy extends to every question in the proceedings which was legally cognizable, and applies

where a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding. A verdict and the judgment in a suit on a mortgage establish the fact that the debt is due and preclude the defendant from setting up fraud as a defense in an action on the bond, and are conclusive on this ground in an action of ejectment for the land sold under the judgment: *Lewis v. Nenzel*, 38 Pa. 222. As are a former verdict and judgment for plaintiff in replevin on an issue of rent in arrears conclusive in a subsequent action in assumpsit for the same rent: *Cist v. Zeigler*, 16 S. & R. 282, 16 Am. Dec. 573. So will the failure in an action to recover for the nondelivery of goods purchased estop the defendant in a suit for the price from denying [*72] the delivery: *White v. Reynolds*, 3 P. & W. 97. So also a judgment recovered against a physician for malpractice is a bar to a subsequent action by him for services in the course of which the malpractice occurred: 15 Barb. 67. The same principle controlled the decisions in *Haneman v. Pile*, 161 Pa. 599; *Bierer v. Hurst*, 162 Pa. 1, and *Wilson v. Buchanan*, 170 Pa. 14, where questions which had been decided on the merits at law were presented on the same grounds in equity.

In these cases and many others depending upon the same principle the precise question had either been decided by a court of competent jurisdiction or the judgment in the first suit had negatived by implication the foundation of the second. Generally the estoppel extends to any allegation which was at issue and determined in the course of the proceedings which went to establish or disprove either the plaintiff's case or that set up by the defendants *Stevens v. Hughes*, 31 Pa. 381; *Beloit v. Morgan*, 7 Wall. 618.

But a judgment is not evidence of any matter which comes collaterally into question, or which is incidentally cognizable, or which is to be inferred by argument from it: *Duchess of Kingston's Case*, 11 State Trials, 261. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters not actually heard and determined, nor to collateral questions which arise but do not become part of the case: *Hibshman v. Dulleban*, 4 Watts, 183; *Martin v. Gernandt*, 19 Pa. 124; *Kelsey v. Murphy*, 26 Pa. 78; *Tams v. Lewis*, 42 Pa. 402; *Schrivver v. Eckenrode*, 87 Pa. 213. The estoppel of a former adjudication will extend only so far as the subject-matter of the second suit

is substantially the same as that of the first, and may be binding on some points while leaving others open to controversy. Notes to *Doe v. Oliver*, 2 Smith's Leading Cases, 763. In order to render a judgment effectual as a bar it must appear that the cause of action is the same in substance and can be sustained by the same evidence; and as between courts of law and courts of equity the rule does not apply to cover the whole ground, nor where questions falling within the exclusive province of equity are involved.

The learned editors of White and Tudor's Leading Cases in Equity in the notes to the *Earl of Oxford's Case*, p. 1372, 4th [*73] Am. ed. citing *Boyce v. Grundy*, 3 Peters 240, say: "To render the adjudication of one court conclusive in another the jurisdiction of the former tribunal must be broad enough to cover the whole ground and leave no essential point untouched and open for consideration. Hence, even when a defense is legally cognizable and might have been received in a court of law, it may be requisite to consider whether it could have been made fully and effectually, and if it could not recourse may still be had to chancery for a larger measure of relief than the law affords. That an action has been brought on a contract for the sale of land, and a judgment recovered against the vendee for an installment of the purchase money, will not therefore necessarily preclude him from filing a bill to have the execution of the judgment stayed and the amount paid or collected under it refunded, and the whole contract set aside as fraudulent; because although the fraud might have been pleaded or given in evidence as a defense to the action it would have only been an answer to the stipulation or covenant on which the suit was brought, and the defendant would still have been obliged to seek relief in chancery." In *Boyce v. Grundy*, *supra*, a bill was filed to enjoin the collection of a judgment at law for the purchase money of land and to rescind the contract on the ground of fraud. In the opinion of the court it is said that the defense of fraud might have been resorted to, yet it was obviously not an adequate remedy because it was a partial one, and the defendant would still have been left to renew the contest upon a series of suits.

The proceeding on the mortgage was after notice by the vendees of the intention to rescind the contract on the ground of misrepresentation, and after the necessary steps preliminary to a resort to equity had been taken, by the tender of a deed and a demand for repayment. There was no ground consistent with

this position on which a defense could have been made at the trial. The verdict and judgment on the *scire facias* determined the amount due on the mortgage, but left untouched matters in dispute which were not, and could not have been, adjudicated. A defense at the trial would have been limited to the question at issue, and if successfully made could not have resulted in more than relief to the mortgagors from the payment of the balance of the price secured by the mortgage. The remedy [*74] sought by the bill is distinct from this and of a much wider scope. It is the cancellation of the agreement and the repayment of the money paid. These are matters which come within the peculiar province of equity. They were not cognizable in the former action, and they are now open for adjudication in a tribunal which affords a wider measure of relief and where an adequate remedy may be obtained.

Some complications which may arise hereafter would have been avoided if the bill had been filed before the trial and a stay of proceedings had until the question of rescision had been decided. The record however presents the single question whether the judgment obtained on the *scire facias* is a bar to the equitable relief sought by the bill. We are of opinion that it is not.

The assignments of error are sustained and the order dismissing the bill is reversed and set aside, and the record is remitted to the court of common pleas for further proceedings.

Judgment for defendant in an action on the contract because (as appeared by parol proof in the second action) the plaintiff had not fully performed, was held no bar to an action on *quantum meruit* for the same services. *Rossman v. Tilly*, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247.

Recovery in an action for the price of a kitchen range was held no bar to an action for negligent construction of it. *Rigge v. Burbridge*, 15 Meas. & Wels. 598, a leading case.

Recovery and satisfaction of a judgment for damages for malfeasance of a contract to cut and stack hay, from which negligence the hay spoiled, was held no bar to a suit for the contract price. *Minnaugh v. Partlin* (1887), 67 Mich. 391, 34 N. W. 717.

Who Are Privies and How Far Bound.

CHASE v. KAYNOR, in Iowa Sup. Ct., Oct. 14, 1889—78 Iowa 449, 43 N. W. 269.

Action to quiet title. Decree for plaintiff, and defendants appeal.

BECK, J. The plaintiff claims title under Charles Felt, who conveyed the land by warranty deed to one Smith. The mesne conveyances to plaintiff were by quitclaim deeds. The defendants also claim under Felt, who by quitclaim deed conveyed the land to one under whom defendants' ancestor claimed title. The deed by Felt, under which plaintiff claims, was executed in 1858, and filed for record in 1869. The deed of Felt, under which defendants claim, was executed and filed for record in 1874. But defendants claim that their title is paramount to plaintiff's for the reason that an action was commenced [*451] by Felt in 1873, wherein, after service by publication, a decree was entered declaring the deed from Felt to Smith, under which plaintiff claims, to be void for the reason that it was not executed by Felt, but was a forgery. This action was against Smith, and his grantee, Bennett, the immediate grantor of plaintiff, and notice thereof was served by publication. Plaintiff was not a party to the action. He had acquired the title two years before the action was commenced. The affidavit required by the statute, to the effect that service cannot be made upon the defendants within the state, was not made and filed. The decree in the action brought by Felt does not defeat plaintiff's title, for two reasons: 1. Plaintiff who held title to the land was not made a party to the action. Of course he is bound by no decree entered therein. But counsel say that his grantor was a party; and, as he is a privy to plaintiff, the latter is bound by the decree. But the relation of privity does not extend backward as to bind a grantee by acts done by the grantor after the grant. The relation of privity does not exist so as to bind plaintiff by a judgment in the case which was brought against the plaintiff's grantor after he had conveyed the land to plaintiff. If a rule of law to this effect prevails, purchasers and grantees of land would never be free from the peril of losing it by the acts of their grantors, or by judgments against them, done and rendered after they conveyed the land. 2. The affidavit required by the statute, to the effect that personal ser-

vice could not be made on the defendants in the action within the state, is necessary to authorize the publication and to confer jurisdiction on the court to take cognizance of the case. We understand from the record that there was no such affidavit. The judgment was therefore void, as being rendered in the absence of jurisdiction. The parts of defendants' answer setting up the decree in the suit brought by Felt, for these reasons, presented no defense in this action. They were stricken out on motion of plaintiff. * * * [*452] * * *

Counsel for defendants insist that, as the record shows that defendants paid taxes on the lands for seven years, and plaintiff does not offer or propose to reimburse them, they cannot recover in this case, on the ground that before claiming equity they must do or offer to do equity. But no such objection was raised by the pleadings or in any other way in the court below. It is not a ground for dismissing plaintiff's petition. But on our own suggestion the decree will provide that plaintiff pay to defendants the taxes paid by them. The amount and date of such payments are shown by a statement in the record. Interest on the payments will be allowed at 6 per centum per annum. But as no such question was raised in the court below, defendants will be entitled to no costs by reason of the modification of the decree which we order.

Counsel for defendants insist that plaintiff cannot recover because of his laches, having "slept upon his rights" for so many years. The case is this: Plaintiff and his grantor held the title to the land, without any adverse claim shown by the record, for about 16 years, when, a conflicting title arises by quitclaim deed executed by the original grantor, "who had slept on his rights" for 16 years, when, being aroused, he commenced action to set aside his former deed. The decree recovered by him we have shown to be void for want of jurisdiction, and the [*453] publication of notice not complying with the requirements of the law. But, if not void, it does not bind plaintiff, who was not a party thereto. Plaintiff was not by any process or notice challenged to defend his title. But with less delay than the claimants adverse to him, are chargeable with, he brings this action to quiet the adverse claim. No movement was made against plaintiff's title for about 16 years. Plaintiff and his grantors have not delayed proceedings adverse to defendants' title for more than 14 years. We think defendants do not show just ground for relief based upon the delay of plaintiff. * * * *Modified and affirmed.*

RODINI v. LYTLE, in Mont. Sup. Ct., Jan. 27, 1896—17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165.

DE WITT, J. The question raised upon this appeal is, what is the effect, upon the sureties on the official bond, of a judgment [*450] rendered against their principal? There is a direct conflict in the authorities upon this question. (2 Black on Judgments, § 588; Mechem on Public Officers, § 290; Brandt on Suretyship and Guaranty, § 637, and cases collected and reviewed in these text books. It is held by many courts that, when a bond is given to the effect that a principal will do a certain act,—as, for instance, pay a certain sum of money, or satisfy a judgment,—then the sureties are bound that he shall do such act; and the judgment against the principal is conclusive against the sureties. But that is not this case, and that question need not here be treated. The bond here was not for the performance of a specific act, but it was for general good and faithful conduct. It is as to judgments against principals who have given bonds of this nature—that is, official bonds of sheriffs and constables—that the difference of opinions among the authorities exists, and which difference we shall now note.

One line of authorities holds that the judgment against the principal is conclusive against the sureties. The courts holding this view are very few, although among them is one wholly respectable tribunal. The second view held is that the judgment against the principal is *prima facie* evidence against the sureties. The third rule laid down by the authorities is that the judgment against the principal is no evidence at all against the sureties, and that, to hold the sureties for the misfeasance of the principal, the facts of the misfeasance must be proved in an action in which the sureties are defendants. These two latter rules are sustained by probably a nearly equal number of respectable courts.

The question being a new one with us, and the authorities being divided, we shall proceed to decide the matter upon what appears to us to be the most reasonable principle.

The case of *Pico v. Webster*, 14 Cal. 203, is a leading case. We find it cited by all text writers, and in many of the opinions. Its reasoning appeals to us so strongly that we quote from it somewhat at length: "This suit was brought on the official bond of the defendant, Webster, who was sheriff of San Joaquin county, against Webster and his sureties. The [*451] suit was brought to recover damages for the levy by Webster on property of plain-

tiff, which levy was made under color of process. Suit was brought against Webster for the trespass involved in this levy and seizure, and judgment recovered against him before the institution of this suit. The record of this recovery was offered as evidence by the plaintiff on the trial. The defendants offered to prove, on their part, that Webster was not guilty of the trespass complained of, and that the property seized was not the property of the plaintiff here. But the court refused to admit the testimony, upon the ground that the judgment against the sheriff was conclusive of all the facts passed upon and decided by the record. To this ruling the defendants excepted, and now present it for review here on appeal. There is no little conflict in the cases on this subject. There can be no doubt that, when a surety undertakes, for the principal, that the principal shall do a specific act, to be ascertained in a given way,—as, that he will pay a judgment,—that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. *Train v. Gold*, 5 Pick 380; *Lincoln v. Blanchard*, 17 Vt. 474. See, also, *Riddle v. Baker*, 13 Cal. 295. It is upon this ground that the liability of a bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the cause of action and been unsuccessful. As the sureties did not stipulate [*452] that they would abide by the judgment against the principal, or permit him to conduct the defense and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability, for to hold that they are concluded from this contestation by the suit against the sheriff is to hold that they undertook, for him, that they would be responsible for any judgment against him which might be rendered

by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct. The authorities which sustain this view are numerous. In *McKell v. Howell*, 4 Hawks 34, a decree against the administrator of a guardian was held not to be evidence against the sureties of the guardian, to charge them with the amount which was recovered against the estate for unfaithful administration of the trust. *Munford v. Overseers*, 2 Rand. (Va.) 313, went a little further holding that a judgment against the sheriff was no estoppel against him in an action on the bond against him and his sureties. It seems to be held there that no recovery could be had against the principal, because he was not liable jointly with the sureties, and that the record of the judgment would be only *prima facie* evidence against the sureties. *Beall v. Beck*, 3 Har. & McH. 242, is to the same effect. *Douglass v. Howland*, 24 Wend. 35, is a leading case. The authorities are reviewed by Mr. Justice Cowan with his usual learning. That case was covenant, brought by the plaintiff against the surety on an obligation, by the principal, to account and pay over such sum as shall be found to be owing by him, and the surety covenant that the party thus agreeing 'shall perform the agreement.' A decree in chancery against the principal was offered. The decree was on a bill filed to compel an account. *Held*, that it was no evidence against the surety, unless he had notice of the suit, and an opportunity to defend in the name of the principal. Many authorities are cited by the learned judge, who concludes that the surety's obligation was to pay over a balance due, not that he should abide by a judgment at law, or decree in chancery, for not accounting." [*453]

The doctrine of this case is reaffirmed in *Irwin v. Backus*, 25 Cal. 214, in which case, however, it was also held, as in 14 Cal. 203, that administrators' bonds are exceptions to the rule announced. See, further, in the opinion in *Pico v. Webster*, for a review of the cases. The rule was also originally held in Pennsylvania in *Carmack v. Com.*, 5 Bin. 184. A departure from the rule was made in that state in *Masser v. Strickland*, 17 Serg. & R. 354. This departure, however, was in the face of an able protest on the part of Chief Justice Gibson, as noted in *Pico v. Webster*, 14 Cal., at page 206. See dissenting opinion of Gibson, C. J., 17 Serg. & R. 358. See, also, generally, *Littleton v. Richardson*, 34 N. H. 179.

In this state, a principal and sureties may be sued together. *Wibaux v. Live-Stock Co.*, 9 Mont. 154; *Hoskins v. White*, 13

Mont. 72; *Woodmen v. Calkins*, 13 Mont. 365; *Nelson v. Donovan*, 16 Mont. 85.

There is no reason, in the case at bar, why the principal and sureties were not originally sued in one action. It therefore seems to us that it is not within the spirit of the practice in this state to allow one to sue the principal first, and then make that judgment either conclusive or *prima facie* evidence against the sureties, who were not made parties to that action. It seems that to allow such practice would be an invasion of the principle that every man is entitled to his day in court. Another principle is that, when a defendant is sought to be charged with a liability, there is not a presumption of his liability to commence with. If we hold that a judgment against the principal is conclusive or *prima facie* evidence against the sureties, the sureties are obliged to start into the action with a presumption of liability against them. The ordinary rule of law is that the plaintiff must prove his case by evidence; but, if a judgment against the principal is evidence against the sureties, the affirmative of the case is thrown upon the defendants. They must take the burden of proof. Instead of the plaintiff proving his case, the defendants are placed in a position of being obliged to prove their nonliability. In analogy to a criminal case, the defendants would be obliged to prove their [*454] own innocence. Defendants, in such a position, would be required to prove that their principal, the constable, had not been guilty of misconduct in his office. They would be obliged to prove that he had faithfully performed the duties of his office. It appears to us, however, that the proof should come from the other side; that the plaintiff should be required to prove, against the sureties, that the constable had not faithfully performed the duties of his office. This seems to us to be within the ordinary rules of practice and pleading. If the other rule is to be adopted, then the sureties would be obliged to go back, perhaps several years in time (three years, as it appears, in this case), and find the witnesses who were able to testify as to whether the constable had committed a trespass upon the goods of plaintiff. By that time the witnesses may be scattered or dead. The principal himself may be dead. The sureties would be obliged to collect a mass of evidence, the knowledge of which would be peculiarly within the possession of the plaintiff, and perhaps only by accident within the reach of the defending sureties. We cannot countenance such practice.

We believe by far the best of the three rules above noticed

is that which denies to the judgment against the principal any effect as against the sureties. We think the sureties should not be compelled to face a judgment, with all its presumptions, and one which was rendered in an action to which the sureties were not parties, and of which they had no notice whatever, and to defend which they had no opportunity.

This action being upon the judgment, as plaintiff's counsel has insisted in his brief and argument, we are of opinion that the district court was correct in holding that the judgment could not bind these sureties. The court was therefore correct in sustaining the demurrers to the complaint.

PEMBERTON, C.J., concurs. HUNT, J., absent.

BRAIDEN v. MERCER, in Ohio Sup. Ct., June 1, 1886—44 Ohio St. 339, 7 N. E. 155.

OWEN, C. J. In October, 1873, Milton W. Junkins was appointed guardian of the estates of two of his minor children. He gave bond, with Samuel Braiden, plaintiff in error, as surety, conditioned that his principal should "faithfully discharge all his duties as such guardian, as is required by law." He entered upon the discharge of his trust. A considerable sum of money belonging to his wards came into his hands as guardian, which he neglected to account for. He thereafter died, and in February, 1880, D. W. Cooper was appointed his administrator, and in February, 1881, as such administrator, and as required by section 6291, Revised Statutes, filed in the probate court of Belmont county an account of the doings of his intestate as such guardian. In June, 1881, the court passed upon this account and found that in his life-time the guardian, as such, had received of his wards' money \$953.48, which, with the interest thereon, amounted to the sum of \$1,384.06, which was adjudged against the estate of the late guardian, and ordered to be paid by the administrator to the then and present guardian, the defendant in error. There being no assets in the hands of the administrator, the action below was brought in the court of common pleas by the present guardian of the wards, [*340] against Braiden and the administrator of his principal upon the bond of the latter for the recovery of the amount found due from the estate of the guardian, and interest. To the petition, Braiden made answer as follows:

"That the said Milton W. Junkins, as guardian, did not file any account of his trust as guardian; that the account filed by his

administrator was filed without the knowledge of this defendant, and this defendant was no party thereto. The defendant further says, that for many years prior to the death of the said Junkins, he, the said Junkins, was a man of intemperate habits; that he was for a very long time unable to work; that he had no real or personal estate, and no income except what he derived from his practice as a physician when able to practice and from an estate by curtesy he had in certain real estate; that at the time he was appointed guardian his wards were infants of tender years, requiring great care and attention; that they had in addition to the moneys claimed to have been received by their guardian the remainder in fee-simple of a piece of real estate in the city of Bellaire, Ohio, of the value of at least forty-five hundred (\$4500) dollars; that while they were possessed of an estate as aforesaid, and their father and guardian unable to provide for himself, he, the guardian, did, at great cost to himself, support, clothe, and educate said children, and on them and in their behalf did expend large sums of money exceeding in the aggregate the amount this defendant is sought to be charged with, and that the said real estate of said wards is still held and possessed by them free of incumbrance. The defendant, Samuel Braidon, further says, that for a long time previous to the death of the said Junkins, he, the said Junkins, was not in condition to transact business; that on that account he did not, in his life-time, claim or ask an allowance for the maintenance of his wards, nor did his administrator for him in the final settlement of his accounts.

"The defendant further says, that the said Junkins was entitled to an allowance for maintaining, clothing, and educating his wards; that his failure to do so was owing to [*341] his condition as aforesaid; and that said guardian was not in fact indebted to his wards in any sum at the time of his death, and that the said claim against him is not valid or equitable."

The plaintiff's demurrer to this answer was sustained, the defendant excepted, and, on his failure to answer further, judgment was rendered against him for the amount demanded in the petition. The district court on error affirmed this judgment. To reverse the judgments below the present proceeding is prosecuted. If Braidon was entitled to the relief demanded in his answer, the judgments below are erroneous and should be reversed.

The single proposition to which we address our consideration is the right of Braidon to a review, in the action below, of the

finding and order of the probate court upon the settlement of the guardian's dealings by his administrator. Braiden was not made a party to, and it is assumed that he had no actual knowledge of, the settlement proceeding in the probate court. That the settlement was final as between the wards and their guardian's administrator, in the absence of an appeal from it or a proceeding to open it in accordance with the statutes, will be conceded. Section 6289, Revised Statutes; *Woodmansie v. Woodmansie*, 32 Ohio St. 18.

Whether a surety upon a guardian's bond is concluded by a settlement in the probate court of his principal's accounts has not, heretofore, been determined by this court. In *State v. Humphreys*, 7 Ohio (1 pt.) 224, it was held that an action against the sureties in a guardian's bond was sustainable without previous liquidation of the amount due from the principal. This case was explained in *Newton v. Hammond*, 38 Ohio St. 435, and the principle established that a right of action against the sureties first accrues to the ward for the amount remaining in the hands of the guardian when such amount is ascertained by the [*342] probate court on the settlement of the guardian's final account. It is said in that case by McIlvaine, J.: "The statement of accounts in the probate court must be verified by the oath of the guardian—a requirement alike important to the sureties and the ward." If the liability of the sureties is not fixed, nor they concluded, by the settlement, it is not apparent why the verification of the accounts is of equal importance to them and the wards.

The principle that a final settlement of a guardian's accounts and the determination by the probate court of the amount due his wards should, in the absence of fraud and collusion, conclude the sureties in an action against them upon the guardian's bond, finds strong support in both reason and authority. The sureties undertake that their principal will faithfully discharge his duties as guardian. Section 6259, Revised Statutes. With other duties the law requires him to render on oath to the proper court an account of his receipts and expenditures, verified by vouchers or proof, etc. * * * At the expiration of his trust fully to account for and pay over to the proper person all of the estate remaining in his hands. * * * To obey and perform all the orders and judgments of the proper courts touching the guardianship. Section 6269, Revised Statutes.

By their bond the sureties contract with reference to the action of a court and that their principal will obey its orders and

conform to such action. Can they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same cause retried. We find in our law numerous illustrations of this principle. The sureties in an undertaking in attachment contract to pay the defendant all damages sustained by reason of the [*343] attachment if the order prove to have been wrongfully obtained. Has it ever been doubted that the determination by the court in the attachment proceeding that the order was wrongfully obtained concluded the sureties upon that question in an action upon the undertaking? By an undertaking in replevin the sureties contract that their principal will duly prosecute the action and pay all costs and damages which may be awarded against him. Nobody will claim that the award of damages in the replevin suit is not final against the sureties in an action against them upon the undertaking. An undertaking in an injunction proceeding is conditioned to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. It has never been supposed that the sureties in an action against them could be heard to say that they were strangers to the injunction proceeding and that the decision of the court that the injunction ought not to have been granted should be disregarded and that question again litigated.

It is not easy to distinguish the principle involved in these proceedings from the one we are considering. Indeed it may well be considered an established principle that whenever a surety has contracted with reference to the conduct of one of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment. *Shepard v. Pebbles*, 38 Wis. 373; *Lothrop v. Southworth*, 5 Mich. 436, 448; *Towle v. Towle*, 46 N. H. 434; *Willey v. Paulk*, 6 Conn. 74; *Stovall v. Banks*, 10 Wall. 588; *Heard v. Lodge*, 20 Pick. 58; *Sturgis v. Knapp*, 33 Vt. 521; *Black v. Caruthers*, 6 Humph. 87; *Dowling v. Polack*, 18 Cal. 625; *Warner v. Matthews*, 18 Ill. 86; *Evans v. Commonwealth*, 8 Watts (Pa.), 398, 34 Am. Dec. 477; *Garber v. Commonwealth*, 7 Pa. St. 266; *Watts v. Gayle*, 20 Ala. 817; *Casoni v. Jerome*, 58 N. Y. 322; *Douglass v. Howland*, 24 Wend. 35; *Brandt Suretyship*, §§ 533, 534.

This principle was applied in an action on an injunction [*344] bond in *Lothrop v. Southworth*, 5 Mich. 448, where it was held that a surety was bound by a decree against his principal and could raise no question of its correctness. It was said in this case that the surety undertook that his principal should abide the judgment of the court. "He can, therefore, raise no question of the correctness of the decree, nor impeach it in this collateral proceeding." The same holding was made in a similar case—*Towle v. Towle*, *supra*, where the court say: "By signing the bond in suit with Towle, the plaintiff in the suit in equity, the sureties voluntarily assumed such a connection with that suit that they are concluded by the decree in it in the present suit upon the bond so far as the same matters are in question."

The supreme court of the United States applied the same rule to the sureties upon an administration bond, in *Stovall v. Banks*, 10 Wall. 583. It is there said that the surety "can not attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself." The same application of this principle was made in *Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197, where the court say: "To most purposes, it seems to us, that the sureties in an administration bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are, in many respects, like the sureties in a bail bond, and equally bound by the proceeding against the principal. The duty they have assumed is that the principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond." In the case of an administrator's bond, the court say, in *Casoni v. Jerome*, 58 N. Y. 322: "Sureties are bound by the decree of the surrogate in such a case, because by their contract they have made themselves privy to the proceedings against their principal, and when the principal is concluded, [*345] the surety, in the absence of fraud or collusion, is concluded."

In *Shepard v. Pebbles*, 38 Wis. 373, it was held that the sureties on a guardian's bond are concluded by the order of the county court on the guardian's accounting, as to the *amount* due from him to the ward. Cole, J., said: "The general rule of course is, that a judgment is conclusive only as against parties and privies; but to this there are exceptions. And it is conceded that whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is con-

cluded by the judgment. * * * In the case before us, the order of the county court fixed the amount of the proceeds of the sale in the hands of the guardian, and directed its payment to the ward. The sureties had contracted that the guardian should and would justly account for the proceeds, and dispose of them according to law, and would perform all orders of the county court by him to be performed. There was a breach of the obligation on the default of the guardian to pay over as he was ordered to do; and the sureties, as well as the principal, are estopped from controverting the correctness of the order ascertaining the amount. They occupy, in many respects, a position like that of sureties in a replevin or bail bond, and are equally concluded by the proceedings against the principal." The strong analogy of this case to the one at bar is apparent. The settlement by the administrator of the deceased guardian is the same in effect as if made by the guardian himself. Section 6291, Revised Statutes. The amount due the wards was ascertained by the court and its payment to the plaintiff below ordered. In this default has been made. No fraud or collusion is alleged in the settlement, but a rehearing of the matter of the account is asked, as if no settlement had been made.

The only case cited by the plaintiff in error to support the claim that the surety may be heard to have a new accounting and settlement, is *Dawes v. Howard*, 4 Mass. 97. This was an action of debt on a bond of a guardian, *the [*346] wards being minor children of the guardian*. The guardian had made no claim in his life-time, but the court allows it to the sureties. There is no intimation in the report of the case that there ever had been a settlement of the guardian's accounts prior to the action upon the bond. The question we have considered was not suggested by court or counsel, and did not arise upon the record.

The more recent case of *Heard v. Lodge*, 20 Pick. 53, *supra*, presents the view of the same court upon this question, and fully supports the conclusion we have reached, which is, that in an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts. There was no error in sustaining the demurrer to the answer.

Judgment affirmed.

When Parties not Adversaries.

KOELSCH v. MIXER, in Ohio Sup. Ct., Dec. 18, 1894—52 Ohio St. 207,
39 N. E. 417.

Action by Koelsch for contribution for money claimed to have been paid by him as co-surety on a school district treasurer's bond with B. A. Mecum, of whose estate defendant is sought to be charged as administrator; and plaintiff alleges that he paid and was compelled to pay the amount sued for on a judgment recovered against him on the bond. Defendant answered that in the action alleged in which judgment was recovered against plaintiff on said bond this defendant was also sued, and by the verdict and judgment found not liable and discharged, and judgment rendered against plaintiff only. Plaintiff demurred to this answer. The demurrer was sustained. On error the circuit court reversed this judgment; and from this judgment plaintiff sues error here.

MINSHALL, J. * * * What the issues [in the former action] between the obligee and the defendants or either of them, were, is [*211] not stated. Hence, the ground of the defense must be, that, as both were parties to that action, the judgment irrespective of what the issues were, releasing one of the defendants, is conclusive of his liability upon the bond as against the other, and of any liability to contribute as a co-surety to the one who was held and compelled to pay the judgment. We do not regard this as the law. Whilst the exact limits of the doctrine of *res judicata* in its application to some cases, are not definitely settled, it is accepted as generally true, that the judgment relied on for that effect in subsequent litigation, must have been pronounced upon the same issues, between the same parties, or their privies, standing in an adversary character to one another. By this is not meant that they should have stood upon the record as plaintiff and defendant, but that this should have been their real attitude upon the issues tried and determined. As before observed, the defendant does not state what the issues were in the former action. If any were joined between himself and the plaintiff in this action, the determination of which may be relied on as conclusive of the rights of the parties, they should have been pleaded. They cannot be left to conjecture. The mere fact that it was there determined that he was not liable on the bond

to the obligee, cannot conclude the plaintiff in this action from demanding contribution from the estate of his deceased co-surety, if, as a matter of fact, they were co-sureties on the bond, and the plaintiff has been compelled to discharge all, or more than his just proportion, of the common liability. The subject matter of the two actions is different. The former was a suit on a treasurer's bond by the obligee against the [*212] makers as co-defendants to recover for a breach of it. The present is a suit by one surety on the bond against the estate of another for contribution; and had not accrued at the time of the former suit. It is not based upon the bond. In the language of McILVAINE, J., in *Camp v. Bostwick*, 20 Ohio St., 337: "It," the right to contribution, "is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. From this relation the common law implies a promise to contribute in case of unequal payments by co-sureties." And he adds, "Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away." And so, it was there held, that though the estate was, by the statute of limitations, released from its direct liability to the creditor, it, nevertheless, remained liable to contribute to a co-surety who had paid more than his moiety of the debt. See also, Kinkead's Code Pleading, section 457.

It is not enough that an issue may have been joined between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue may have been, it was not an issue between himself and his co-defendant, the plaintiff in this action, and could not therefore conclude the latter; though parties to the suit they were not such in an adversary character, being simply co-defendants to the suit on the bond. The plaintiff in this suit could not in the former suit, as a matter of right, have insisted on the admission or rejection of evidence on the trial of the issue; had no right to move for a new trial, nor prosecute error if aggrieved by the rulings of the court; [*213] and hence he cannot be held bound by the judgment in any subsequent litigation to which he may be a party. *Vose v. Morton*, 4 Cush. 27, 31.

It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they are adversary parties in the original action. Freeman on Judgments, § 158; Black on Judgments, § 599; 21 Am. & Eng. Enc. Law, 151; *McMahan v. Geiger*, 73 Mo. 145; *Gardner v. Raisbeck*, 28 N. J. Eq., 71; *Buffington v. Cook*, 35 Ala., 312; *Har-*

vey v. Osborn, 55 Ind., 535; *Cox's Adm'r v. Hill*, 3 Ohio, 412, 424.

The case of *McCrory v. Parks*, 18 Ohio St., 1, is much in point. There the action below was a suit by one surety on a sheriff's bond against his co-sureties for contribution. The question arose on a cross-petition filed by one of them, and the reply of the plaintiff. In the cross-petition the allowance of a claim of money paid on the amercement of the sheriff, to which all had been made parties, was asked. The reply controverted the justice of the judgment, and claimed that it should not have been rendered—that the amercement had been for the alleged failure of the sheriff to pay over moneys made on an execution against the cross petitioner; that, though the court found and adjudged in the former action that the money had been paid, yet as a matter of fact it had not been paid and the judgment was wrongly entered; and the question arose, whether having been a party to the former judgment, the plaintiff was not concluded by it. The court held not, for the reason that the parties to this suit were not adversary parties in the former suit, and that their respective rights against each other were not in controversy [*214] in that suit. The only difference between this case and the one under review is, that in the former case a judgment was pleaded in which the opposite party was held to an obligation, and here he was released. But this can make no difference in the application of the principle; the conclusiveness of the judgment, in either case, must depend on the same question—whether an issue was joined between the parties and determined in the former case, material to their respective rights in the subsequent suit; for, as shown by the authorities above cited, and they are sustained by reason, when such is not the case, there is no ground for the application of the doctrine of *res judicata*; which rests upon the principle of public policy, which requires that where a matter has once been tried and determined on issues joined between the parties in interest in a court of competent jurisdiction, there should in the interest of society, be an end of litigation. It, however, reaches and concludes only parties to the issue; and does not affect persons who, though parties to the suit, were not parties to the issue upon which the judgment was rendered. The latter being strangers to the issue, are, in a legal sense, strangers to the judgment.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

WILLIAMS, J., dissents.

Accord: Buffington v. Cook, 35 Ala. 312, 73 Am. Dec. 491; *Bulkley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Jones v. Vert*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379; *Montgomery v. Road*, 34 Kan. 122, 8 Pac. 253; *Pioneer Savings Ass'n. v. Bartsch*, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511; *St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626; *Gardner v. Raisbeck*, 28 N. J. Eq. 71; *Ostrander v. Hart*, 130 N. Y. 406, 29 N. E. 744.

"If two persons are sued on a note, and judgment taken without cross-pleadings, the question of who shall pay the debt as between themselves is left open; but that both are liable to the creditor is adjudicated, and can no longer be disputed even as between themselves." *Westfield Gas & M. Co. v. Noblesville & E. G. Co.*, 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244.

WALDO v. WALDO, in Mich. Sup. Ct., Dec. 20, 1883—52 Mich. 91, 17 N. W. 709.

SHERWOOD, J. * * * The purpose and object of the bill of complaint in this case is to obtain a decree establishing the title in fee to the lands therein mentioned, in complainant and Mary Allen as children and heirs at law of deceased. It appears from the record that Mary Allen, in May, 1881, filed her bill of complaint, making the parties to this suit defendants therein, for the purpose of accomplishing the same object sought by the bill in this case; that the case was finally heard on appeal in this court on the merits, and the complainant's bill dismissed. See *Allen v. Waldo*, 47 Mich. 516.

From the facts as they now appear before us, the complainant should have joined with his sister as a party complainant in the first suit, but failing to do so, he was properly made a party defendant therein, and as such, is subject to all the legal [*93] consequences necessarily resulting therefrom. The complainant was not only a party to that suit and the adjudication therein, but privy in blood and estate with the complainant in the same. Both were alike interested in the subject-matter of the litigation; both claimed under the same conveyance and as heirs at law of the same ancestor. They each claimed, not separate and distinct moieties, but equal, undivided interests in the entire property; and we think that if one is concluded by the final decision made in this court in the former case, then equally so is the other. *Prentiss v. Holbrook*, 2 Mich. 376; *Hale v. Chandler*, 3 Mich. 535; *Cooley's Const. Lim.* 47-51, and cases cited; 1 Greenl. Ev. §§ 180, 322, 323, 535, 536; *Herm. on Estoppel* §§ 46-49, 59.

The right now claimed by complainant could have been as fully asserted and maintained in the former suit as in this. It was competent for the court in that case, upon the pleadings and

such proofs as were proper in the case, to make a decree determining and establishing the rights and interests of each of the parties without the necessity of a cross-bill or other proceeding for affirmative relief. 1 Barb. Ch. Pr. 339; *Thurston v. Prentiss*, 1 Mich. 194; *Elliott v. Pell*, 1 Paige 262; *Jones v. Grant*, 10 Paige 348. The complainant was a necessary party in the first suit—see Story's Eq. Plead. (6th ed.) §§ 72, 150 and cases there cited—and being such party he was a party to every issue joined and litigated in it that could in any way affect his interests or his rights, and must be concluded by the decree upon those issues, and if he did not maintain his rights the decree is no less binding so long as he had the opportunity and neglected to do so.

We think the first suit and decree are clearly a bar to the present action, and that the decree of the circuit judge sustaining defendant's plea and dismissing complainant's bill was right and must be affirmed with costs.

The other Justices concurred.

Accord: Lewis v. Brown Township, 109 U. S. 163, 3 S. Ct. 92, 27 L. ed. 892; *Georgia R. & B. Co. v. Wright*, 124 Ga. 596, 53 S. E. 251; *Devin v. Ottumwa*, 53 Iowa 461, 5 N. W. 552; *Bougert v. Blades*, 117 N. C. 221, 23 S. E. 179.

Effect of Judgment as to Strangers.

RUFF v. RUFF, in Pa. Sup. Ct., Jan. 7, 1878—85 Pa. St. (6 Norris) 333.

Debt on a judgment note sued by C. P. Ruff for use of Wm. Hillis against Michael Ruff in Westmoreland common pleas. The note was executed by Michael to C. P., August 1, 1868, and assigned by C. P. to Hillis, Feb. 20, 1874. Defendant pleads that before this action was commenced and before the assignment of the note to Hillis, this defendant was summoned as garnishee in an action by Thos. J. Barclay against C. P. Ruff, and upon issue formed and tried between said Barclay as plaintiff and this defendant as garnishee, he was found not liable on said note, and judgment entered in his favor; which judgment is a bar to this action. To this special plea plaintiff demurred. The demurrer was held bad, and judgment given for the defendant. Plaintiff brings error. Reversed.

GORDON, J. * * * The one question for us to resolve is. was C. P. Ruff, by reason of his having been served with the

writ of attachment, such a party or privy to this issue as would make the judgment therein binding on him? If he is so bound, the demurrer to the defendant's plea in bar was well ruled by the court below; if not, that ruling was erroneous. But if he was such a party, then should he have been included in the issue and the jury should also have been sworn as to him; this, however, was not done; and why not? The answer is, because he had no standing as a party against the garnishee, and was, therefore, properly excluded from a participation in the trial. If he had ought to say against the judgment, from which the attachment issued, he might have pleaded and had issue; it is, that he might have such opportunity, that the act of assembly directs that notice be given the debtor, if he is in the county. With such trial, however, the garnishee has no concern, neither is it a prerequisite to a trial against him: *McCormac v. Hancock*, 2 Pa. St. (2 Barr) [*336] 310. It is thus apparent that the two issues are quite distinct, and that whilst in the latter, the garnishee has no interest, in the former the debtor has none, and so may not intervene either to direct or control it. So completely does his interest antagonize that of both the contending parties that, even before the Act of 1869, he might have been a witness for either: *Gemmill v. Butler*, 4 Pa. St. (4 Barr) 232. Again, it is not correct to assume that the attaching creditor stands, in all respects, in the place of the debtor as to the goods and credits attached; for, if such were the case, then would a judgment, for or against the garnishee, be conclusive, not only as to the debtor, but also as to his creditors. Such, however, is not the case as to creditors or trustees in insolvency: *Breading v. Siegworth*, 29 Pa. St. (5 Casey) 396; *Tams v. Bullett*, 35 Pa. St. (11 Casey) 308.

What shall we say, then; that the debtor is concluded by the result of an issue in which he has no interest; from which by legal rule he is excluded; in which he cannot be heard, except as a witness, and which does not conclude his creditors? This proposition contains in itself its own answer. If one is to be concluded by a judgment he must have his day in court; some say in, and control over, the trial. But C. P. Ruff had neither control over nor say in the issue between Barclay and the garnishee. Barclay might have permitted the case to go by default; he might have discontinued, or he and the garnishee might have compromised, and C. P. Ruff could not have intervened to prevent either. He was literally barred out of the case, and for the sufficient reason

that he was no party to it; hence, by all rule, he is not concluded by the judgment resulting from its trial.

The judgment of the court below is reversed.

Exceptions to Rule that Strangers are not Bound.

Whenever the fact that a verdict or judgment has been rendered or the consequences of that mere fact become material, the official record of that judgment is always competent and conclusive evidence to prove that such verdict or judgment has been rendered and to prove the facts that result as a necessary legal conclusion from such verdict or judgment; and such evidence is conclusive, not only against parties to the proceeding, but against strangers as well. This record, when so put in evidence by or against strangers, establishes the fact of the verdict and judgment as recorded, but is no evidence of the facts on which the judgment was based. Black on Judgments, § 603.

"In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others: 1, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and, 2, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently, neither a creditor nor stranger can interfere in a *bona fide* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor, does not arise till the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors. Where, however, fraud is established, the creditor does not claim through the debtor, but adversely to him and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment, by which the latter himself would be estopped." *Candee v. Lord*, 2 N. Y. 269, 66 Am. Dec. 294. *Accord: Papst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384, and cases cited.

"Where a fact may be established by proof as general reputation, such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding the same fact is *prima facie* evidence thereof against third persons. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation." *Pile v. McBratney*, 15 Ill. 314, 319; 1 Greenleaf Ev. 555

MAYALL v. MAYALL, in Minn. Sup. Ct., Jan. 24, 1896—63 Minn. 511, 65 N. W. 942.

Action by Ada Mayall as trustee under a conveyance of Mary A. Mayall, against the other living beneficiaries under the said conveyance, alleging that the gross rentals from the trust property were insufficient to pay the annual taxes and maintenance charges, and by reason of the dilapidated condition of the buildings the returns would continue to decrease; but that the property could be sold for about \$100,000 or mortgaged for a

sum sufficient to put such improvements on it as would rent at a profit. The complaint prayed that plaintiff be authorized to sell or mortgage and improve the property. From a decree granting the authority prayed, the infant defendants, by their guardian, appeal.

MITCHELL, J. * * * [*514] It will be observed that the declaration of trust contains no power or authority for selling, mortgaging, or otherwise disposing of the property; also that, according to the terms of the declaration, other persons may hereafter come into being who will be beneficiaries of the trust. These two facts raise the two principal questions presented by this appeal, to-wit: 1. Has the court, for the purpose of preserving the trust, power to order a sale, mortgage, lease, or other disposition of the trust property when the trust instrument contains no power or authority for so doing? 2. Has the court power, in such a case, to bind by its judgment or decree parties not yet in being who may hereafter become beneficiaries of the trust? Both questions must be answered in the affirmative. The inherent power of a court of equity to do these things in such a case rests upon the paramount consideration of necessity and "high expediency." Neither statutory authority nor express authority in the deed nor other instrument of trust is necessary. At common law a court of equity had the inherent power to do what was necessary to be done to preserve the trust from destruction. The district court, as a court of general jurisdiction both at law and in equity, has the same inherent powers, in that respect, as was possessed by a court of chancery. The authorities are all one way on this question. *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858; *United States Trust Co. v. Roche*, 116 N. Y. 120, 22 N. E. 265; *Anderson v. Mather*, 44 N. Y. 249. The power of the court is exercised, not to defeat or destroy the trust, but to preserve it. Even in case of an absolute sale, the trust is not destroyed. There is merely a change in the form of the trust property. The proceeds are impressed with the trust, and are to be administered in accordance with its terms, under the direction of the court. The distinction must be kept in mind between the power to sell or mortgage merely for the benefit of the *cestui qui trust*, and the power to sell or mortgage in order to preserve the trust from complete destruction. The court will always exercise the power for the latter purpose, while it might not, and usually would not, for the former. *In re Roe*, 119 N. Y. 509, 23 N. E. 1063. That there is a necessity to either sell, mortgage, or lease this property in

order to preserve the trust is established by the findings of the court. By its judgment it has retained control of the whole matter in its own [*515] hands, and it must be presumed that it will do its full duty, and not approve of any disposition of the property that is not necessary to preserve the trust. None of the cases cited by appellants' counsel seem to us to be in point. Many of them are cases which deny the inherent power of a court of chancery to sell an infant's real estate. But this is in no proper sense a judgment ordering a sale of an infant's estate for the supposed benefit of the infant. If it was, the matter would be exclusively within the jurisdiction of the probate court. The infants' interest here is a mere contingency, and it is not merely this contingent interest that is to be sold, mortgaged, or leased, but is the entire trust property; and this is done solely for the purpose of preserving the trust from destruction, and the infants are made parties merely because they have a contingent interest in the trust.

2. The power of the court to bind parties not in being, but who may hereafter come into being and have an interest in the trust, rests upon the same ground of necessity and "high expediency." All persons in being who have any interest in the trust have been made parties. Of course, those not in being cannot be made parties; and if the court cannot bind them by its decree or judgment, its inherent power to do with the property whatever is necessary to preserve the trust would be so hampered and limited as to be in a great measure rendered nugatory. The rule that only those who are parties to a suit are affected by the decree is subject to certain well-recognized exceptions in equity. Thus, where there is real estate in controversy which is subject to an entail, it is generally sufficient, all parties having antecedent estates being before the court, to make the first tenant *in esse* in whom an estate of inheritance is vested a party with those claiming the prior estates, without making any persons parties who may claim in remainder or reversion after such vested estate of inheritance. Story Eq. Pl. § 144. The rule is stated thus in *Giffard v. Hort*, 1 Schoales & L. 386, 408: "Where all parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that, if there be a tenant for life, remainder [*516] to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remainderman

is barred. * * * Courts of equity have determined, on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." *Id.* 407. If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against the latter. If there are never so many contingent limitations of a trust, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after him will be bound by the decree, though not *in esse*, unless there is fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested. *Freem. Judg.* § 172 and cases cited; in *Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 Sup. Ct. 206, the court cited *Gifford v. Hort* with approval, and held that a contingent interest in real estate or an executory devise is bound by judicial proceedings affecting the real estate where the court has before it all the parties that can be brought before it, and the court acts upon the property according to the rights that appear, without fraud. The court also quoted from *Lord Redesdale's* treatise on *Pleading* (173-4), [to which we have not had access,] to the effect that "contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights." These authorities fully cover this case. The trustee and every person having any vested interest in the trust property, as well as every one in being who has any contingent interest in it, were before the court. It is also to be noted, although perhaps not material, that every class of possible parties not in being who may become interested in the trust property were represented before the court by one or more of the parties to the [*517] action. See, also, *Hale v. Hale*, *supra*; *Anderson v. Mather*, *supra*; *Clarke v. Cordis*, 4 Allen 466; *Evans v. Wall*, 159 Mass. 164, 34 N. E. 183, 38 Am. St. Rep. 406; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805. The same principle was applied in *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99. It is

true that in the last case the decree under consideration was in probate proceedings, which are *in rem*, while the present action is in form *in personam*; but the judgment is in effect *in rem*, acting as it does directly on the *res*, viz., the trust property. There is nothing in the contention that the probate court, and not the district court, has jurisdiction of the matter so far as the interest of the infant defendants is concerned. The subject-matter of controversy is between infants and third parties. It might as well be claimed that the district court has no jurisdiction in partition, foreclosure, or any other recognized head of equity jurisdiction, whenever a minor chances to be interested.

Judgment affirmed.

See also to the same effect: *Doremus v. Dunham*, 55 N. J. Eq. 511, 37 Atl. 62; *Watson v. Watson*, 3 Jones Eq. (N. Car.) 400; *Rutledge v. Fishburne*, 66 S. Car. 155, 44 S. E. 564; *Ridley v. Halliday*, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. 902; *Miller v. Foster*, 76 Texas 479, 13 S. W. 529; *Faulkner v. Davis*, 18 Grat. (Va.) 690, 98 Am. Dec. 718; *Gray v. Smith*, 76 Fed. 525; *Finch v. Finch*, 2 Ves. 491; *Hopkins v. Hopkins*, 1 Atk. 581.

But see *DeLeon's Estate*, 102 Cal. 537, 36 Pac. 864.

SATISFACTION OF JUDGMENTS

NATURE OF WRITS TO MAKE SATISFACTION.

STATUTE OF WESTMINSTER SECOND [13 EDWARD I, A. D. 1285], CHAPTER 18.—Cum debitum fuerit recuperatum, vel in curia regis recognitum, vel damna adjudicata sit de cætero in electione illius qui sequitur pro hujusmodi debito, aut damnis, sequi breve quod vicecom' fieri faciat de terris et catallis debitoris, quod vicecom' liberet ei omnia catalla debitoris (exceptis bobus et afris carucæ), et medietatem terrae suae quousque debitum fuerit levatum per rationabile percium et extantum. Et si ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, et postea per breve de redisseisina, si necesse fuerit.

TRANSLATION.—When debt is recovered, or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sues for such debt or damages, to have a writ of *feri facias* to the sheriff to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and half of his land, until the debt is levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of novel disseisin, and after by a writ of redisseisin, if need be.

BARDORF v. HUMFREY, Mich. 31, Edw. I, A.D. 1303—Horwood's Year Books 30 and 31, Edw. I, p. 440.

Walter, the son of Humfrey, was bound in 40*l.* to Sir Robert Bardorf, by a recognizance in the court, &c.; by virtue of which, after the day fixed for payment, he sued to have by statute, a moiety of Walter's lands until, &c.; and seizin was delivered to him, &c. Afterwards Walter came and sued out of the rolls a *scire facias* against Sir Robert to compel him to account to him, &c.; and by the extent and by the account it appears that there were five years' arrears, &c. *Walter*: Here are the arrears and we pray that the land may be delivered to us. *Tondeby*: The land was delivered to us by virtue of the statute to be holden as freehold until, &c.; and we do not understand, &c., that, &c., until we have levied our debt. HENGHAM [J.]: This statute was submitted to the consideration of the king and his council, who agreed that whenever the debtor came prepared with the debt, the lands should be redelivered to him; therefore, will you take your money? *Tondeby*: We pray our damages and our expenses besides. HENGHAM, [J.] You shall have nothing except the amount of the recognizance, &c.; wherefore, &c. And Walter

sued out a writ to have back the lands; and because the land had been sown by Robert, &c., it was ordered that Walter should repay the cost of the seed, and the amount of money laid out on the land, &c.

SIR WILLIAM HARBERT'S CASE, in the English Court of Exchequer Chamber Mich. Term, 27 & 28 Eliz., A. D. 1585—3 Coke, 11b.

This was a *scire facias* issued out of the court of exchequer in the 18th year of Eliz., on a recognizance acknowledged to the king in the court of augmentation in the fourth year of Edward VI., by Matthew Harbert. Said Harbert having died, the *scire facias* was directed against the executors of his will and the heirs of his land, and the sheriff made return that said Harbert had no executors within his bailiwick and that he had summoned Sir William Harbert, the son and heir of said Matthew, etc. On the return day said Sir William made default, upon which the barons gave judgment in favor of the Queen against him generally for said 3000*l*. And thereupon said Sir William brought the case here on writ of error, and assigned three errors: 1 on the *scire facias*; 2 on the return; and 3 on the judgment.¹ And this term the errors were moved by *Plowden*, being of counsel with *Sir William Harbert*, before *Sir Thomas Bromley*, Lord Chancellor of England, and the *Baron of Burleigh*, Lord Treasurer of England, and the two chief justices, *Wray* and *Anderson*, in the exchequer chamber. And in this case divers points were resolved.

First, that at the common law, where a common person sues a recognizance or a judgment for debt or damages, he shall not have the body of the defendant, nor his lands (unless in special case) in execution. But at the common law he shall have execution in such case only of his goods and chattels, and of corn, and the like present profit which shall grow upon the land, to which purpose the common law gave him two several writs: [*12] 1. A *levari facias*, by which writ the sheriff was commanded, *quod de*

¹THE ERROR ALLEGED of the *scire facias* was that it was against the heir of the land and not against the heir simply. The error alleged of the return was that it was not responsive to the writ in that it specified no land. The error alleged of the judgment was that it should have been special, because defendant's own land, not acquired by descent from his father, would be liable on this general judgment, whereas he was liable only as terra tenant. These are the questions which the reporter says were not resolved by the court. The case is given here because it is generally cited as a leading case on the matters here reprinted, and because the law is stated with Coke's usual accuracy and discrimination.

terris & catallis ipsius A. &c. levare facias, &c.; and another writ called *feri facias*, which was only *de bonis & catallis*, both which writs ought to be sued within the year after the judgment, or the recognizance acknowledged; and if he had not the one or the other within the year, the plaintiff or the conusee was put to his action of debt. And now by the statute of Westminster 2d, cap. 45, a *scire facias* is given; and by the statute of Westminster 2d, cap. 18, *cum debitum fuerit recuperatum, &c.*, the *elegit* is given of the moiety of the land, which was the first act which subjected land to the execution of a judgment, or of a recognizance which is in the nature of a judgment, and therewith agreeth Fitzherbert's *Natura Brevium* 265, g. And by the statute of 13 Edw. 1. *de mercatoribus*, 27 Edw. 3, cap. 9, and 23 Hen. 8, cap. 6, it is provided, that in case of a statute merchant or statute staple, all the lands which the conusor had at the day of the conusance shall be extended in whose hands soever they after come, either by feoffment or other manner. But in debt against the heir upon an obligation made by his ancestor, the plaintiff by the common law should have all the land which descended to him in execution against him, and yet he should not have execution of any part of the land against the father himself; but the reason thereof was, because the common law gave an action of debt against the heir; and in such case, if he should not have execution of the land against the heir, he could have no fruit of his action; for the goods and chattels of the debtor do belong to his executors or administrators, and so for necessity in such case, only land was liable to execution of the debt of a common person at the common law. Also the body of the defendant was not liable to execution for debt at the common law, *vide* 13 Hen. 4, 1. But the common law, which is the preserver of the common peace of the land, did abhor all force as a capital enemy to it; and therefore, against those who committed any force, the common law did subject their bodies to imprisonment, which is the highest execution, by which he loses his liberty till he agree with the party, and pay a fine to the king; and therefore it is a rule in law, that in all actions *quare vi & armis*, *capias ad respondendum* lies, and where *capias* lies in process, there, after judgment, *capias ad satisfaciendum* lies, and there the king shall have *capias pro fine*. With that agreeth 8 Hen. 6, 9; 35 Hen. 6, 6; 22 Edw. 4, 22; 40 Edw. 3, 25; 49 Edw. 3, 2, and many other books. Then by the statutes of Marlebridge, cap. 23, and Westminster, 2, cap. 11, *capias* was given in account, for at the common law process

in account was distress infinite; and afterwards by the statute of 25 Edw. 3, cap. 17, the like process was given in debt as in account, for before that statute the body of the defendant was not liable to execution for debt, for the reason and cause aforesaid; but it was resolved, that at the common law, the body, the land, and the goods of the accountant, or the king's debtor, were liable to the king's execution, for *thesaurus regis est pacis vinculum et bellorum nervi*. And therefore the law gave the king full remedy for it; and therewith agrees 5 Eliz. Dyer 224, and Plowden's Comm. 321; *Sir William Cavendish's Case*, who was treasurer of the chamber, 24 Edw. 3; *Walter de Chirton's Case*; and infinite precedents in the exchequer, to prove, that for the king's debt, the body and the land of the debtor shall be liable by the common law before the statute of 33 Hen. 8, cap. 39. * * * [*15] * * *

But these [omitted] points were not resolved by the court, but afterwards, on a petition made to the queen, Sir William compounded with her. Plowden and Coke were of counsel with Sir William Harbert. * * *

THOMPSON v. CLERK, in Queen's Bench, Mich. Term, 38 & 39 Eliz., A. D. 1597—Cro. Eliz. 504.

Trover and conversion of goods at D. in the county of Nottingham. The defendant saith that he recovered against the plaintiff a debt of 20*l.* by bill in the queen's bench, and thereupon had a *feri facias* directed to the sheriff of York, who, at Wakefield in the county of York seized those goods and delivered them unto him in satisfaction of this execution, and so justifies the conversion. It was thereupon demurred, and without argument ruled, that the pleading was ill: 1, because * * * 3. The sheriff upon a writ of *feri facias* cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt. Wherefore it was adjudged for the plaintiff.

SUYDAM v. SMITH, in N. Y. Sup. Ct., Albany, Special Term, April, 1845—7 Hill 182.

Appeal Suydam, Sage & Co. from an order vacating an arrest and order of arrest on *capias* with bail fixed at \$30,000, for failure of defendants to deliver on demand 3000 barrels of mess pork and 300 barrels of prime pork according to their warehouse receipt which had been duly assigned to plaintiffs.

BRONSON, Ch. J. The defendant may be held to bail, of course, in the action of trover. (2 R. S. 348, § 7.) But it is said, that this law has been modified by the non-imprisonment act; and that now a defendant who received the property as a bailee, and might be sued on the contract of bailment, [*184] can no longer be held to bail where the plaintiff elects to bring trover: that the cases for holding to bail in that action are those where the defendant either came to the possession of the property by finding, or took it tortiously. If there be such a distinction, it must be matter of positive law; for there is no principle upon which it can be maintained. The man who wrongfully converts to his own use the property which another has entrusted to his care, is chargeable with a deeper shade of moral guilt than the one who converts property which he has either found, or tortiously taken; for in addition to the wrongful appropriation of another man's goods, which is common to all of the cases, the bailee is also guilty of a breach of trust.

Let us now see whether the non-imprisonment law reaches the case. It provides, that no person shall be arrested or imprisoned on civil process, in any suit or proceeding instituted "for the recovery of any damages for the non-performance of any contract." (Stat. 1831, p. 396, § 1.) The bailor cannot sue in trover unless there has been a wrongful conversion of the property; and when he does sue in that form, it is not to recover damages "for the non-performance of any contract," but to obtain redress for the tort. The contract of bailment may be given in evidence for the purpose of proving the plaintiff's title, and showing that the property was in the possession of the defendant; but the contract is not the foundation of the action. It is true that the bailor may sue on the contract expressed in or implied from the bailment. But he may waive that remedy, and sue for the tort; and when that is done, I see nothing either in the non-imprisonment law, or the reason of the thing, which forbids that the defendant should be held to bail.

It is understood that the judge revoked the order to hold to bail on having his attention called to the case of *Brown v. Treat*, (1 Hill, 225,) which was not in his mind at the time the order was made. It must be admitted that the language of Cowen, J. in that case strongly favors the argument that the defendant cannot be held to bail where the original relation between the parties was that of bailor and bailee, and where the plaintiff might sue on the contract implied from the bailment. But the [*185] case

did not necessarily call for the decision of that question; for there, in addition to a count in trover for the tort, the declaration contained two counts in assumpsit for a breach of the implied contract of the bailee. On this strange declaration, to which there was a plea of not guilty, the plaintiff had obtained a verdict and judgment, and issued a *ca. sa.* on which the defendant was arrested. The plaintiff had recovered upon all of the counts; and it was enough to say, that where the bailor sues upon the contract—although there may be a misjoinder of other counts—the bailee cannot be imprisoned on the judgment. It was on that ground that the defendant was discharged from the arrest: and *Brown v. Treat*, like other cases, should only be considered as settling the question which was necessarily presented for adjudication.

There is another plain distinction between that case and the one now before us. There, the action was between the original parties to the bailment, and the plaintiff might have sued on the contract. But it is not so here. The plaintiffs purchased the property after the defendants had received it in store from McKay, and they could not sue in their own names on the contract of bailment. The only injury which they have sustained is the wrongful conversion of the property, and their only remedy is an action sounding in tort. As between these parties, I do not see how the case can be distinguished from any other action of trover.

But it is not necessary to rest the case upon this distinction. We think it should be put upon the broader ground, that wherever there has been a wrongful conversion of the goods, for which trover will lie, the defendant may be held to bail, in whatever way the property came to his possession.

The result is, that the motion of the plaintiffs must be granted; and that of the defendants denied.

Ordered accordingly.

Contra: Southern Express Co. v. Lynch, 65 Ga. 240.

Fraudulent contrivance of a mortgagor to deprive mortgagee of part of property is ground for *capias*. *In re Hicks*, 20 Mich. 280.

See also *Ex parte Clark*, 20 N. J. L. (1 Spencer) 648, 45 Am. Dec. 394.

In Ohio there can be imprisonment on civil process only in the cases expressly provided by statute. *Spice v. Steinruck*, 14 Ohio St. 213.

MOORE v. GREEN, in N. Car. Sup. Ct., June Term, 1875—73 N. C. 394,
21 Am. Rep. 470.

Appeal from an order refusing a motion to vacate an order of arrest on a *capias ad respondendum* for libel.

RODMAN, J. * * * It is contended that an arrest in an action for a libel, is in violation of section 16, of the Bill of Rights of this state, which says, "there shall be no imprisonment for debt in this state, except in cases of fraud." The argument is this, The [*397] moment a judgment shall be obtained, the claim for damages is converted into a debt; the person of the defendant is thereupon liberated, and his bail discharged. For what purpose then require bail, who are to be discharged at the first moment when their liability can be of any value? It is an oppression to the defendant and of no possible benefit to the plaintiff. *Delinger v. Tweed*, 66 N. C. Rep., 206, is cited as the authority for the proposition that the claim for damages is converted into a debt within the meaning of the constitution, by the recovery of judgment. Undoubtedly, for some purpose, it is. An action of debt may be maintained on it, and a *fi. fa.* may issue on it. But to construe the above cited clause of the Bill of Rights, as forbidding imprisonment for any cause of action which, by judgment would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes: those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for *debt*, they plainly imply that it may be allowed in actions, which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz: for a cause of action arising *ex contractu*, they responded to the general public sentiment; but I know of no writer on the reform of law, who has recommended the abolition of punishment for trespassers and wrong doers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from the state its power to impose a wholesome check on violence and wrong, and would tend to license disorders and law-break-

ings incompatible with the peace and welfare of society. [*398]

Dellinger v. Tweed has no application to the present case. It is confined to a construction of the article of the constitution respecting homesteads.

There is no error in the judgment below.

PER CURIAM.

Judgment affirmed.

HORMANN v. SHERIN, in S. Dak. Sup. Ct., Nov. 19, 1895—8 S. Dak. 36, 65 N. W. 434, 59 Am. St. Rep. 744.

KELLAM, J. While this appeal is entitled as in the original action to which it was supplementary, the matter now before the court is an appeal from an order of the circuit court of Marshall county, refusing to discharge appellant, on *habeas corpus*, from arrest under an execution against his person. Upon the hearing of the writ there were before the court the [*37] judgment roll, including, besides the general verdict, what is termed in the abstract a "special verdict." The complaint alleged several distinct causes of action, the second of which was in effect for money had and received. Appellant contends that, inasmuch as a body execution could not be issued on a judgment upon such cause of action, it cannot issue upon a judgment in an action in which such cause was one of several, the trial of which resulted in the judgment. This is ordinarily true, but the reason is that it is impossible to tell upon which or what particular cause of action the judgment rests, and if the rule were otherwise, a judgment debtor would be exposed to imprisonment on account of a cause of action for which imprisonment is not allowed by law. But here the special verdict distinctly shows upon which cause of action, and upon what facts, the general verdict and the judgments rests. It finds that defendant converted to his own use certain enumerated promissory notes and county warrants of the plaintiff. The aggregate amount of these notes and warrants, as listed in the special verdict, make up just the amount of the general verdict leaving no doubt that they found their general verdict upon the first cause of action, and upon that alone. The verdicts would not fit and could not reasonably follow either of the other causes of action stated in the complaint, for that was the only one alleging conversion of notes and warrants. We think, with appellant, that upon this record such an execution could not rest upon either of the conditions named in the second subdivision of Sec. 4945, Comp. Laws, for the reason, among others, that while it is alleged in the complaint that the property

claimed to be unlawfully converted by the defendant was received by him as an attorney and agent of the plaintiff, the answer denies such allegation, and the verdict does not find upon or settle that issue. It simply finds the fact of conversion. Such verdict does not establish any fiduciary relation between the parties, and so does not bring the case within the scope of said second subdivision. The general verdict, however, explained by and [*38] resting upon the special verdict, does establish the first cause of action alleged—the wrongful conversion of notes and warrants belonging to the plaintiff. By the first subdivision of said Sec. 4945, this is ground for arrest, and by Sec. 5115 an execution may issue against the person, although there had been no previous order of arrest, if “the complaint contains a statement of facts showing one or more of the causes of arrest required by said Sec. 4945.” The complaint does state all the facts necessary to constitute a cause of action for conversion. The cause of action stated in the complaint, and the cause for arrest as named in the statute, are identical. Upon a judgment in such action, execution against the person may issue. *Winton v. Knott*, 7 S. D. 179, 63 N. W. 783; *Wesson v. Chamberlain*, 3 N. Y. 331; *Richmeyer v. Remsen*, 38 N. Y. 206; *Lembke's Case*, 11 Abb. Prac. (N. S.) 72.

Appellant further contends that, without an order of the court or judge, there being none in this case, the clerk had no authority to issue execution against the person, there having been no previous order of arrest. While we think that it might be a safer practice to obtain an order in such case, we find nothing in the statute indicating that such leave is necessary. In respect to issuance by the clerk, the statute seems to make no distinction between an execution against property and an execution against the person. Under similar statutory provisions, the New York courts have often held, though not without an occasional intimation to the contrary, that no order or leave of court was necessary. *Ginocchio v. Figari*, 4 E. D. Smith, 227; *Alden v. Sarson*, 4 Abb. Prac. 102; *Kloppenburg v. Neefus*, 4 Sandf. 655; *Lockwood v. Van Slyke*, 18 How. Prac. 45. In the latter case, Marvin, J. said: “The Code has made no provision for applying to the court or judge for leave to issue a *ca. sa.* If the right exists in this case, it is without reference to any order, and the plaintiff may exercise the right. He will act, however, at his peril.” We find nothing in the record that would justify a reversal of the order appealed from, and it is affirmed. All concur.

ALLEN v. HALL, in Mass. Sup. Jud. Ct. Nov. Term, 1842—46 Mass. (5 Metc.) 263.

SHAW, C. J. In *scire facias* against a trustee. The question is, whether the defendant can set off demands, which he had at the time he was summoned in the suit, against Joseph Tufts, the principal defendant.

The trustee process, provided for by statute, manifestly contemplates two distinct classes of cases, in which a creditor may avail himself of its provisions to secure his debt, by attaching property in the hands of a third person; the one, when the trustee has in his custody, or under his control, goods or chattels, liable by law to be attached on mesne process, by the ordinary writ of attachment; the other, where the trustee is a debtor to the principal defendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day. *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass. 438; *Swett v. Brown*, 5 Pick. 178.

This distinction is founded on the statute rendering *goods* and [*265] *credits*, respectively, liable to attachment. In the former case, the attachment binds the goods specifically, creates a lien upon them, of the same nature and to the same extent, as an ordinary attachment on mesne process, although the goods are to *stand charged*, in the hands of the trustee, so that the custody remains with the trustee, instead of being taken by the attaching officer, unless a subsequent attachment is made by another creditor, which may be done, subject to the first attachment. *Parker v. Kinsman*, 8 Mass. 486; *Burlingame v. Bell*, 16 Mass. 318. But in both cases, the goods thus charged are deemed to be in the custody of the law, and they are made applicable to the purpose for which they are attached and held, in the same manner; that is, by being advertised and sold by the officer on execution, and the proceeds applied to its satisfaction. The only difference is, that in the case of the trustee attachment, the goods having remained in the custody of the trustee, must be by him exposed and delivered over to the officer holding the execution; whereas, in the case of an attachment by the ordinary process, the goods are in the custody of the officer, ready to be sold on the execution, when it comes into his hands for satisfaction.

But under the other clause of the statute, rendering *credits* liable to be attached, the case is wholly different. It affects another species of property, and accomplishes its purposes in an en-

tirely different mode. The great question then, the only question, is, whether he owes the principal debtor any thing; and if it appears that he does, he is held liable to pay it to his creditor's creditor, instead of paying it to the creditor himself. It is unnecessary here to consider the various questions which may arise, as to the nature of such debts: whether absolute or contingent, and the nature of such contingency; whether, if uncertain at the time, it can be made certain at a future time, by sales, collections of money or other proceedings, showing that in point of fact the trustee was a debtor to the principal at the time of the attachment. In such cases, although the facts are subsequently disclosed, and the accounts subsequently adjusted, in order to [*266] charge the trustee, the result must show that the trustee was a debtor to the principal, at the time of the attachment.

This distinction between the two classes of cases will go far to show in what cases the trustee may or may not set off such claims as he may have against the principal debtor, and to reconcile what may, without discrimination, be deemed to be conflicting authorities.

On the provision, in which the trustee is charged as a debtor, it is very obvious that as he is a mere third party, called in to pay his debt, in a manner different from that in which he was bound to pay it, and in which his own rights are not drawn into controversy, he ought not to be placed in a worse situation than he would be if he were called to make the settlement with his creditor. The balance only, after all just allowances, is the sum for which he ought to be held. He shall therefore have the benefit of a set-off, legal or equitable, in his own right, or in the right of those with whom he is in privy, and in whose favor the debt claimed to be due from the trustee could, in his hands, be made available, by way of set-off in any of the modes provided by law. *Hathaway v. Russell*, 16 Mass. 473; *Picquet v. Swan*, 4 Mason, 443, (Fed. Cas. No. 11133).

But where the trustee has goods in his custody, the property of the principal defendant, and in their nature liable to be attached by the process of law, the question, whether the trustee has any right to set off claims of his own, must depend upon the fact whether he has any lien, legal or equitable, upon such goods, or any right, as against the owner, as whose property they are attached, by contract, by custom, or otherwise, to hold the goods, or to retain the possession of them, in security of some debt or claim of his own. If the party, who is summoned as trustee, has

a mere naked possession of the goods, without any special property or lien; if the principal debtor is the owner, and has a present right of possession, so that he might lawfully take them out of the custody, or authorize another to take them out of the custody of the present holder; they would be liable to be attached as the property of the general owner, by an officer, under the common process of attachment, if he could have access [*267] to them, and no right of the trustee would be violated. But if the officer cannot have access to the goods, so as to take them into custody; if they are secreted by the trustee, or if the trustee sets up pretended claims and rights of possession, so that the creditor and officer cannot safely take them out of the custody of the trustee, and require the answer and disclosure of the trustee, as to the grounds of his claim to the property or possession; then he may be summoned as trustee; and if it shall subsequently appear, on his disclosures, that he had only such naked possession, without any lien or right of possession, then the goods stand *charged* in his hands, till judgment and execution; and he has no greater right to charge these goods with a debt of his own, by way of set-off, than he would have had, if the goods had been taken into custody by the officer, at the time of the attachment. This, we think, is the result of the laws on this subject. *Allen v. Megguire*, 15 Mass. 490; *Swett v. Brown*, 5 Pick. 178; *Brewer v. Pitkin*, 11 Pick. 298.

We are next to consider how these principles apply to the facts of the present case. It appears that the respondent, Hall, sued out a writ against his debtor, Joseph Tufts, and caused his goods to be attached by an officer. Before judgment, without the consent of the debtor, and without the appraisal and certificate required by law to warrant a sale of goods attached on mesne process, the defendant caused the goods to be sold, and himself became the purchaser of the greater part of them, and, for aught that appears in his answers, had them in his possession at the time of the service of this trustee process. This sale, it is manifest, was wholly void, being not conformable to the Rev. Sts. c. 90, and not authorized by law. *Howe v. Starkweather*, 17 Mass. 240; *Russell v. Dudley*, 3 Metc. 147.

The respondent obtained the bare custody of the goods, without lawful possession or right of possession. If the respondent could have the goods in security of his original debt against Tufts, or set off that debt, under this process, he would in effect get possession of his debtor's goods, under color of legal process, with-

out conforming to the requisitions of law, and thus avail himself of such unauthorized possession, to the same extent [*268] as if he had taken and sold the goods on execution in conformity to law; which he cannot do. The court are of opinion that upon his answers, the respondent was chargeable for the goods of Tufts, when they thus came into his possession, and that not having exposed and delivered them over to be sold, when demanded on the execution, he is now answerable on this *scire facias*, for their value.

VARIOUS NAMES FOR GARNISHMENT.—In Massachusetts, Maine, New Hampshire and Vermont garnishment is known as trustee process, and the garnishee is called trustee. In Connecticut and Rhode Island, and to some extent in other states, it is called foreign attachment or attachment, and formerly in Connecticut it was called factorizing; but in all these states the stakeholders summoned are called garnishees.

ISSUING WRITS OF EXECUTION, ATTACHMENT, ETC.

What is Issuing the Writ.

GOWAN v. FOUNTAIN, in Minn. Sup. Ct., June 22, 1892—50 Minn. 264, 52 N. W. 862.

MITCHELL, J. The only questions raised by this appeal involve the validity of the execution sale under which plaintiff claims title to the real estate in controversy. Judgment was rendered and docketed in the district court in and for Swift county in favor of the plaintiff and against the defendant Bensel. The clerk of the court in that county "issued" (to use the language of the findings) an execution on the judgment directed to the sheriff of Chippewa county, (in which the land in question is situated,) in which the date of docketing the judgment in the latter county was left blank, and at the same time "issued" a transcript of the judgment, and delivered both to plaintiff's attorney, with directions to him to have the date when the judgment should be docketed in Chippewa county inserted in the execution before it was delivered to the sheriff for service. The attorney transmitted both to the clerk of the court of Chippewa county, with instructions, after the transcript was filed, and the judgment docketed in that county, to insert the date of such docketing in the execution. Pursuant to these instructions, the clerk in Chippewa county filed the transcript, and [*266] docketed the judgment, and inserted the date thereof in the execution, and returned it to the attorney, by whom it was thereafter delivered for service to the sheriff of Chippewa county, who proceeded thereunder to levy upon and sell the land in question. It will be observed from this that the judgment had been docketed in Chippewa county before the execution was delivered to the sheriff, and that the fact and date of such docketing were then correctly stated therein.

The line of reasoning by which it is sought to establish the proposition that this execution was void is substantially as follows: That at common law all process of courts is limited to the territory over which their jurisdiction extends; that the territorial jurisdiction of the district court in and for a particular county is

limited to the county in which it is held; that, therefore, the district court has no authority to issue an execution to another county, except that conferred by statute, which is limited to counties where the judgment is docketed (1878 G. S. ch. 66, § 299); that consequently such docketing is a condition precedent to the authority to issue an execution, which jurisdictional fact must appear on the face of the execution when issued (Id. § 295); that this execution, having been issued before the judgment was docketed in Chippewa county, was absolutely void. This is substantially the line of reasoning advanced by Justice Ryan, speaking for the court, in *Kentsler v. Chicago, M. & St. Paul Ry. Co.*, 47 Wis. 641, 3 N. W. 369. We do not find it necessary to determine in this case whether it is sound or not. We may remark, however, that it seems to us more severely logical than practical, and we are by no means clear that under our judicial system it is correct to say that the territorial jurisdiction of the district court is limited to the county in which it sits, especially in view of the provisions of 1878 G. S. ch. 64, § 3.

But, conceding the soundness of the doctrine, its applicability to the present case depends upon the assumption that this execution was *issued* at the date on which it was made out by the clerk of the court of Swift county, and by him delivered to plaintiff's attorney. If this premise is false, of course the conclusion falls with it. The delivery to the attorney was not unqualified, but only provisional and conditional; the condition being that the judgment should be docketed [*267] in Chippewa county, and the date thereof inserted in the execution before it was delivered to the sheriff for service. It was issued, in the sense of being taken from the clerk's office, before the judgment was docketed in Chippewa county, but the judgment was docketed in that county before the execution was issued in the sense of being delivered to the sheriff for service; and this is, in legal contemplation, the date of the issue of an execution. This was, in substance, what was held in *Mollison v. Eaton*, 16 Minn. 426, (Gil. 383). It is true that in that case the levy was on personal property, but, as respects the authority to issue an execution to another county, we cannot see how that makes any difference. The practice adopted in the present case has obtained in this state from a very early date. It is an eminently convenient one and injures nobody. Our conclusion, therefore, is that the execution and the sale under it were valid. * * *

Judgment reversed.

This ruling and criticism of *Kentzler v. Chicago, M. & St. P. Ry. Co.* are approved in *McDonald v. Fuller*, 11 S. Dak. 355, 77 N. W. 581, 74 Am. St. Rep. 815. In a suit against the sheriff by one claiming by assignment from the judgment debtor after the levy, to recover the value of the goods, it was held that the irregularity in issuing the execution to and levying it in another county before the transcript was filed there was cured by subsequently filing it, the execution being fair on its face. *Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828. This decision was followed in giving judgment in favor of the purchaser at execution sale in an action brought to try the title, though the facts appeared on the face of the execution. *Hoerr v. Meihofner*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674.

As in the above case, the extent of the court's territorial jurisdiction may be debatable; but that judicial writs have no force beyond the borders of the court's territory is established beyond dispute. *Needles v. Frost*, 2 Okl. 19, 35 Pac. 574; *Rathbun v. Ranney*, 14 Mich. 382; *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621. Compare, also, *Lindley v. O'Reilly*, *ante*, 75.

In Kentucky absence of the statutory ground for sending the writ to another county is held to render the execution and sale thereon "voidable, but not void, and its validity is made to depend on the innocence of the purchaser." *Sanders v. Ruddie*, 2 T. B. Mon. 139, 15 Am. Dec. 148.

What is Issuing. An order was made staying execution for twenty days. During this time the clerk signed, sealed, and delivered an execution to the creditor's attorney. After the stay expired the attorney delivered it to the sheriff who levied it. Mandamus to compel the lower court to vacate the levy was denied, because the writ was not issued till it reached the sheriff's hands. *Peterson v. Wayne Circuit Judge*, 108 Mich. 608, 66 N. W. 487.

The statute declared that judgments of courts of record should be liens on the land of the debtor within the county, but should cease to be such if execution thereon should not be issued within a year. An execution was filled out, signed, sealed, and deposited by the clerk in a pigeon-hole for the sheriff. These facts were held not to be issuing the writ, so as to preserve the lien. *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433.

On What Demands the Writs May Issue.

FERRIS v. FERRIS, in Vt. Sup. Ct. Grand Isle County, Jan. Term, 1853—
25 Vt. 100.

Trespass by Daniel W. Ferris against George W. Ferris in which W. H. Mosher was summoned as trustee. Defendant pleaded in abatement that the writ was issued as an attachment in an action of trespass. Plaintiff demurred. Judgment for defendant, and plaintiff appealed.

ISHAM, J. The present trustee act, Comp. Stat. 256, provides, that upon all contracts, express or implied, made since the first day of January, 1839, and upon all contracts where the principal defendant [*102] has absconded from, or is resident out of

this state, or is concealed within it, a suit may be commenced thereon by a trustee process. This mode of relief is unknown at common law. The remedy itself, the form of the process, and mode of procedure, are given and prescribed by statute, and when adopted, its provisions are to be strictly pursued, and unless the case is expressly provided for by the act, it cannot be sustained. These principles are illustrated and confirmed by the case of *Park et al. v. Trustees of Williams*, 14 Vt. 213. It is evident, therefore, that this suit cannot be sustained as a trustee process, for the cause of action against the principal defendant does not arise *ex contractu*. It is only in cases of that character that this process is given by statute * * * [*103] * * * The result is, that the judgment of the county court, dismissing the suit, must be

Affirmed.

HAWES v. CLEMENT, in Wis. Sup. Ct. Oct. 13, 1885—64 Wis. 152, 25 N. W. 21.

Motion by Clement and five other execution creditors of Boyd to vacate an attachment of Boyd's property, levied in an action by Hawes against Boyd, and a counter motion by Hawes that the property be used in satisfaction of his judgment. The circuit court denied the motion by Clement *et al.* and granted Hawes's motion. Clement *et al.* appeal. The principal ground for the motion to vacate was that Hawes's claim was of such a nature that an attachment could not lawfully issue in an action to enforce it.

LYON, J. The moneys in the hands of the sheriff, being the proceeds of the sale of the attached property, are under the control of the court, and doubtless the court may inquire and determine who is entitled thereto, and order the same paid over to the person or persons so entitled. The procedure to that end, in form, is in the action of *Hawes v. Boyd*, [*154] yet, in substance and effect, it is not strictly in that, or in either of the actions against Boyd, but is rather in the nature of a special proceeding growing out of and founded upon all of those actions; to which proceeding all the attaching creditors of Boyd (and perhaps Boyd also) are parties. If the respondent's attachment was valid, he is entitled to have his judgment paid first out of such moneys. If his attachment is not valid, the appellants, the other attaching creditors of Boyd, are first entitled to have the moneys applied in payment of their judgments in due order of priority. Manifestly

the appellants may, in some proceeding, litigate and have determined the question of the validity or invalidity of such attachment. Regarding substance rather than mere form, we think they have adopted an effectual procedure to obtain an adjudication of that question. If authorities are required to a proposition so reasonable and just, they may be found cited in the notes to Sec. 275, Drake on Attachment. * * *

The cause of action stated by the respondent in his action against Boyd is to the effect that in March, 1884, he delivered to Boyd goods, wares, and merchandise of the value of \$7,814.83 to be sold by the latter for him at Janesville. * * * [*155] * * *

The complaint concludes with the following averments: "This plaintiff further shows that he is unable to state what, if any, portion of said goods so delivered by this plaintiff to said defendant to be sold as aforesaid, remain unsold; and this plaintiff will be unable to state the exact amount till after he takes an inventory of the goods remaining unsold and belonging to this plaintiff; and this plaintiff further shows that the balance of said goods so delivered to said defendant and remaining unsold, or sold and unaccounted for, is the sum of \$6,845.18, with interest from the said 14th day of July, 1884." Judgment is demanded for the sum last named.

It is essential to a valid execution of a writ of attachment that the affidavit annexed thereto should state not only a statutory cause for issuing the writ, but also the amount of the defendant's indebtedness to the plaintiff "as near as may be, over and above all legal set-offs." R. S. § 2731. The statement of the amount of such indebtedness is a most vital one. For the purposes of the execution of the writ it imports absolute verity, because it is not traversable in a proceeding by traverse to dissolve the attachment. R. S. § 2745. Such statement is the guide to the officer executing the writ as to the amount of property he ought to seize in order to secure the plaintiff. Hence it is required for the protection of the debtor, and of his other creditors as well.

Considering the importance of such statement, it necessarily and logically follows that if the cause of action be of such a character that it is impossible for the plaintiff or [*156] his agent to know the amount of such indebtedness, no attachment founded upon it can be lawfully executed.

Taking the most favorable view for the respondent, *Hawes*, of the transactions between himself and Boyd, and we have this state of facts: *Hawes* delivered his goods to Boyd, in trust that

Boyd would sell them and pay over to him the proceeds of the sales, less one half the net profits. In stating the indebtedness, *Hawes* included nothing for profits. He merely claimed the value of the goods delivered to Boyd, less payments. We may therefore exclude from consideration any question of the amount of profits. But in order to ascertain the amount of Boyd's indebtedness to *Hawes* at any given time, it was necessary to know what amount Boyd had realized for such of the goods as he had theretofore sold. It was not sufficient to know merely what goods he had sold, for the value thereof is not the measure of his indebtedness. It is the amount realized which, under the contract mentioned in the complaint, measures the liability of Boyd. Hence, before *Hawes*, or any one for him, could state the amount of Boyd's indebtedness, it was necessary to have an accounting of the goods sold and the prices realized therefor. Because the respondent's attachment was sued out and executed before any such accounting was had, and before he or his agent knew, or could know, the amount of Boyd's indebtedness (all which sufficiently appears in the complaint in that action), it must be held that the respondent obtained no lien upon the property attached, as against the appellants, who subsequently attached the same property.

* * * [*159] * * *

It results from the views above expressed that the order of the circuit court, that the respondent's judgment and execution be first paid out of the moneys in the hands of the sheriff, must be reversed, and the cause remanded with directions that such moneys be first applied in satisfaction of the appellants' judgments and executions in due order of priority.

By the Court. It is so ordered.

PARTNERSHIP ACCOUNTING.—“This, then, is a suit for the liquidation and settlement of a partnership, the ascertainment of the balance and decree therefor. It is true that the plaintiff professes to have calculated and to his own satisfaction ascertained the balance; but it is quite obvious that the partnership affairs involve mutual items of debit and credit, numerous and diversified in their nature. * * * It would seem impossible under the showing of the petition itself, and especially as it does not allege that any accounts have been rendered, nor any balance of account actually struck by the partners, that the plaintiff should be able to declare with certainty, the amount which, on a final liquidation and settlement of these affairs, will be found due to him. * * * We do not, however, wish to be considered as laying down the rule that, in no case of joint adventure can a partner proceed by attachment. Suits may occur in which the business of the adventure may be so limited and simple in its features, as to exhibit a case where the party might be considered as able to swear to a positive and precise balance.” Decree dissolving the attachment affirmed. *Brinegar v. Griffin*, 2 La. An. 154. To same effect. *Johnson v. Short*, 2 La. An. 277; *Barrow v. McDonald*, 12 La. An. 110; *Treadway*

v. Ryan, 3 Kan. 437; *Rice v. Beers*, 1 Rice's Dig. of S. Car. Rep. 75; *Ackroyd v. Ackroyd*, 11 Abbott Prac. (N. Y.) 345, 20 How. Prac. 93. But see *Humphreys v. Matthews*, 11 Ill. 471. In Georgia and California the point has been made, but the attachments were sustained on the ground that the parties were not in fact partners. *Wheeler v. Farmer*, 38 Cal. 203; *Holloway v. Brinkley*, 42 Ga. 226.

An excellent argument by Ewing, C. J., to the effect that attachment does not lie if the amount is not sufficiently certain to enable the court to fix the amount of bail which the defendant must give to dissolve the attachment, will be found in *Jeffery v. Wooley*, 10 N. J. L. (5 Halsted) 145. In that case the attachment in an action on a plea of covenant was quashed because it did not appear from the attachment affidavit or other proceedings in the action that the covenant broken was of such a nature that the plaintiff's damages for the breach of it would be certain. "The jurisdiction must be shown not presumed."

ATTACHMENT HAS BEEN HELD AVAILABLE in an action for damages for breach of contract to furnish tea of a certain quality, the tea furnished being inferior. The measure of damages is the difference between the market value of the tea furnished and that promised. *FISHER v. CONSEQUA*, 2 Wash. C. C. 382, Fed. Cas. No. 4816. This is the leading case on this point. The same was held in a similar action for delivering flour inferior to contract. *Wilson v. Wilson*, 8 Gill (Md.) 192, 50 Am. Dec. 685. And beans inferior to contract. *Haebler v. Bernharth*, 115 N. Y. 459, 22 N. E. 167. Again it was held available in an action for damages for the non-delivery of goods promised, *Goldsborough v. Orr* (lumber) 21 U. S. (8 Wheaton), 217; *Hyman v. Newell* (cigars), 7 Col. App. 78, 42 Pac. 1016; *Stiff v. Fisher* (cattle), 2 Tex. Civ. App. 346, 21 S. W. 291. Again, though the goods promised were a specific stock of goods then in store (*Carland v. Cunningham*, 37 Pa. St. 228), or a certain promissory note, the measure of damages being the difference between the contract price and the face of the note with interest. *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896. Again the attachment was held available on a quantum meruit for the use of vessels and for demurrage. *Roelofson v. Hatch*, 3 Mich. 277. Again in an action for damages for failure to sell as agreed land purchased by plaintiff through defendant in consideration of such agreement. "The amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information it affords." It is "the difference between the value of the land at the end of the year and the amount which the defendant bound himself to realize from it for the plaintiff." *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64. Again attachment was held available in an action for damages for failure to tow a certain keel-boat up Red river and deliver corn at certain places. *Jones v. Buzzard*, 2 Ark. 415. Again, for failure to scale logs, thereby preventing plaintiff cutting them and causing him expense by the delay. *Messinger v. Dunham*, 62 Ark. 326, 35 S. W. 435. Again, attachment was held available in covenant for failure to build a mill and pay \$1,500 for a warranty deed which had been tendered. *Barber v. Robeson*, 15 N. J. L. (3 Green), 17. Again, in debt for goods sold and delivered and for failure to pay an accepted draft including \$25 attorney fees occasioned by such failure. *Waples P. G. Co. v. Basham*, 9 Tex. Civ. App. 638, 29 S. W. 1118. Again, for accepting only 260 harmonists under a contract for the sale of 600, and not paying for those furnished. *Roth v. American Piano M. Co.*, 35 Misc. (N. Y.) 509, 71 N. Y. S. 1080. Again for failure to accept marble work for a building. *Sullivan v. Moffat*, 68 N. J. L. 211, 52 Atl. 291.

ATTACHMENT WAS HELD NOT AVAILABLE in action for damages for not furnishing buggies to sell on commission as agreed whereby plaintiff lost profits: *Wilson v. Louis Cook Mfg. Co.*, 88 N. Car. 5; and on facts much the same except that the contract was to sell clothing by sample. *Hochstadler v. Sam*, 73 Tex. 315, 11 S. W. 408. This is also an excellent case for the student to read. Again, for refusing to employ a ship according to charter party whereby the owner was to have \$670 per month as long as the voyage named should require. *Clark v. Wilson*, 3 Wash. C. C. 560, Fed. Cas. No. 2841. This is a leading case. Again, for refusing to deed and deliver several parcels of land subject to separate incumbrances, and certain bonds and stocks in exchange for others held by plaintiff. *Hough v. Kugler*, 36 Md. 186. Again, for delay in selling a cargo of flour and failure to invest the proceeds in a cargo of coffee as agreed. *Warwick v. Chase*, 23 Md. 154. Again, for failing to mine at least 10,000 tons per annum and pay \$2 per ton royalty. *Heckscher v. Trotter*, 48 N. J. L. 419, 5 Atl. 581. Again, for failure to ship a stock of boots and shoes to plaintiffs, who had rented a store to engage in business. *Hoover v. Hathaway*, 20 Dist. Col. (9 Mackey), 591. Again, for value of iron defendant agreed to carry safely but lost. *Hazard v. Jordan*, 12 Ala. 180. Again, for failure of title to a patent sold to plaintiff. *Mills v. Findlay*, 14 Ga. 230.

While the decisions above named are not all reconcilable the courts rendering them claim to follow the rule announced in *Fisher v. Consequa* above.

UNCERTAINTY IMMATERIAL.—In several cases it is declared that uncertainty as to the amount of plaintiff's demand is no objection and the attachment sustained. See following. For negligently towing a raft of logs; *New Haven S. S. Co. v. Fowler*, 28 Conn. 103; negligently carrying goods; *Lenox v. Howland*, 3 Caines, N. Y., 257, 323; or for a defect in a grain drill sold and warranted to plaintiff; *Baumgardner v. Dowagiac Mfg. Co.*, 50 Minn. 381, 52 N. W. 964; or for refusing to accept and pay for a stock of hardware at agreed price; *Lord v. Gaddis*, 6 Iowa 57; or for damages on an attachment bond; *Withers v. Brittain*, 35 Neb. 436; 53 N. W. 375; or for breach of promise to marry, attachment being given on "all money demands," *Morton v. Pearman*, 28 Ga. 324; or for unpaid duties on silks smuggled; *U. S. v. Graff*, 67 Barber (N. Y.) 304, for the loss of profits from defendant's failure to furnish a machine to make nails. *Bates Mach. Co. v. Norton I. W.* 113 Ky. 372, 68 S. W. 423. See also *Steen v. Norton*, 45 Wis. 418.

IN LOUISIANA it is said attachment is given to recover a debt and an action may be in the debit or the detinet, "which is on an express agreement to deliver any specific property." Therefore attachment lies in an action against a carrier for loss of goods; *Hunt v. Norris*, 4 Martin (La.) 517; and in an action for failure to bind and return books. *Turner v. Collins*, 1 Martin, N. S. 369.

IF THE PENALTY NAMED IN A BOND is to cover such damages as the party may become entitled to, and not to liquidate the damages, attachment does not lie unless the damages are so certain in amount as to comply with the rule announced in the text. *Brown v. Hoy*, 16 N. J. L. 157; *Cheddick v. Marsh*, 21 N. J. L. 463; *State v. Beall*, 3 H. & M. (Md.) 347; *Hough v. Kugler*, 36 Md. 185.

AMOUNT OF FINAL RECOVERY.—"And though the defendant may

contest the demand upon him, or may show that no damage has in fact been sustained by the plaintiffs, that does not affect the question whether the contract supplies the plaintiff a measure of damages to which he can make affidavit." *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896.

It has been said that the danger of oppression could and should be avoided by the court exercising a sound discretion in controlling the writ and limiting the amount to be attached when the amount due is uncertain, without impairing the usefulness of the writ. *Roth v. American Piano M. Co.*, 35 N. Y. Misc. 509, 71 N. Y. Supp. 1080.

EMERSON v. DETROIT STEEL & SPRING CO., in Mich. Sup. Ct.,
April 17, 1894—100 Mich. 127, 58 N. W. 659.

Bill by assignee for benefit of creditors to set aside attachments against the assignor, for irregularities and for want of grounds for attachment. Defendants appeal.

MONTGOMERY, J. * * * The defendants contended that the court of chancery has no jurisdiction to set aside an attachment at the suit of an assignee for the benefit of creditors. * * * [*130] It is settled that a subsequent attaching creditor may have relief in equity against an unauthorized attachment by another. *Hale v. Chandler*, 3 Mich. 531; *Hinchman v. Town*, 10 Id. 508; *Edson v. Cumings*, 52 Id. 52. And we are convinced that an assignee for general creditors should have the same remedy. Any other rule would result in this: That property seized by an unauthorized attachment may be reached by a subsequent attaching creditor, but it cannot be distributed *pro rata* among all creditors. It is suggested that the assignee has the right to intervene in the suit at law, but the contrary was held in *Gott v. Hoschna*, 57 Mich. 413. See, also, *Rowe v. Kellogg*, 54 Mich. 206.

Numerous objections are made to the regularity of the attachment proceedings.

The affidavits, after stating that defendant is justly indebted to the plaintiff upon contract, etc., each state that the defendant fraudulently contracted the debt *or* incurred the obligation respecting which the suit is brought, using the language of the statute. It is contended that the use of the disjunctive "or" renders the affidavit invalid. We hold the affidavit sufficient in this respect. The incurring of an obligation under the statute can be nothing other than contracting an indebtedness, in a case [*131] where the suit is brought, as it must be under the statute, upon contract, and where the affidavit shows that it is brought upon contract. If the defendant incurred an obligation, it was

an obligation to pay money. Each phrase expresses the same thing in a different way. The distinction between the cases where the use of the disjunctive renders the affidavit invalid and those in which it does not is well stated in Drake on Attachments, at section 102: "Where the disjunctive 'or' is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction just mentioned (that is, rendering the affidavit void for uncertainty) would be inapplicable." See, also, cases cited in note, and Wap. Attachm. p. 98.

It is suggested that an expression in one of the affidavits, stating that the debt is due to plaintiffs from defendant "upon express contract and implied contract," is as indefinite as the use of the word "or" would be. We do not see how this can be maintained. The statement shows affirmatively the indebtedness, and that the same is due upon express and upon implied contract. The question is ruled by *Buehler v. De Lemos*, 84 Mich. 554. * * * [*132] * * *

The next question was whether there were grounds for attachment. We think there was sufficient to show that the indebtedness was fraudulently contracted. It sufficiently appears that Dun's reports were based upon the sworn reports of the company to the secretary of state; that both the plaintiffs in attachment extended credit upon the strength of these reports; and we are satisfied that these statements of the company were false, and could have been made with no other purpose than that of establishing a false credit. * * * [*133] * * *

It is contended by the complainants that the defendants, by including a demand not due, debarred themselves from priority as to all of their demand. There is nothing to indicate any fraudulent intent on the part of the plaintiffs in attachment in averring the amount of their claims. There was certainly no collusion between them and the debtor. We think, under the circumstances, the question is ruled by *Hinchman v. Town*, 10 Mich. 508. See, also, *Dawson v. Brown*, 12 Gill & J. (Md.) 53; *Boarman v. Patterson*, 1 Gill (Md.) 372; and *Gross v. Goldsmith*, 4 Mackey (D. C.) 126. It would render proceedings in attachment very precarious if it should be held that, in averring the amount due, the entire attachment should fail if, upon a subsequent trial of the question of fact, it should be determined, either as [*134] a matter of law or a matter of fact, that the plaintiff in attachment was mistaken.

The decree of the court below will in each case be modified. The plaintiffs in attachment will be declared entitled to a lien under their attachment. * * *

THE FACT THAT PLAINTIFF FAILS TO RECOVER AS MUCH AS HE SWORE to be due is not ground for dismissing the attachment (*Brewer v. Ainsworth*, 32 Ga. 487; *Sackett v. Partridge*, 4 Iowa, 416; *Mendes v. Freiters*, 16 Nev. 393; *Donnelly v. Elser*, 69 Tex. 282, 6 S. W. 563; *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896); unless more is intentionally claimed than he expected to be able to recover. *Tucker v. Green*, 27 Kan. 355; *Hale v. Chandler*, 3 Mich. 531, and cases cited therein.

It has been quite generally held that an attachment obtained for the amount of several demands will be wholly dismissed if any one of the demands was such as attachment could not issue on. *Willman v. Freidman*, 3 Idaho 734, 35 Pac. 37; *Estlow v. Hanna*, 75 Mich. 219, 42 N. W. 812; *Wilson v. Harvey*, 52 How. Prac. (N. Y.) 126; *Meyer v. Evans*, 27 Neb. 367, 43 N. W. 109; *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577; *Smith Drug Co. v. Cusper Drug Co.*, 5 Wyo., 510, 40 Pac. 979.

While recognizing the rule above stated as sound, it is said in *Mackey v. Hyatt*, 42 Mo. App. 433, that an attachment for the whole of an open account is proper if any of the items were fraudulently contracted, because it is "a debt *in solido* and not severable. It is a running account for merchandise, and an action on any part of it would bar an action for the balance. * * * When we admit that part of an indivisible debt was contracted in fraud, we may say the entire debt was." See also *Dawson v. Brown*, 12 Gill. & J. (Md.) 53; *Gross v. Goldsmith*, 4 Mackey (D. C.) 126; *Roth v. American Piano Co.*, 35 N. Y. Misc. 509, 71 N. Y. Supp. 1080.

How Early the Writs May Issue.

HARGAN v. BURCH, in Iowa Sup. Ct. 1859—8 Iowa 309.

Action commenced by attachment on open account. From judgment for plaintiff defendant brings error.

[*311] WOODWARD, J. The defendant's motion to quash the attachment was overruled, which is the first error assigned. We do not think the objection substantial. Section 1717 of the Code, directs the sheriff to note on the original notice the time of its receipt, and § 1663 enacts that the delivery of the notice to the sheriff, with the intent that it be served immediately, is a commencement of the action. But it will be noticed that this latter provision is contained in the chapter, 99, which relates to the limitation of actions. The intention here is, that when the precise time of the commencement of an action becomes material, the fact referred to in § 1663, is made to define that time. The filing

the petition, or the issuing the notice, might have been made the point, but these might take place without an intent to prosecute the action immediately, so that delivering the notice with intent to be served, is made the time to which to reckon, especially in the question of limitation. The action may, however, be fairly considered as begun, for other purposes, and, perhaps, to all common intents and purposes, when the petition is filed. At least, it seems consistent and reasonable to consider it so far commenced, as that part of its own process—such as a writ of attachment—may issue even before the notice. There is no harm, no wrong, effected by this. In truth there is no possible reason why the attachment should not issue before the notice, save the provision that the attachment may issue at the commencement, or during the progress of a suit. Section 1846. And the force of this depends upon the construction to be given it. If sections 1663 and 1846 are to receive a rigid construction, so that there is no “commencement” of an action in any sense, nor to any purpose, but in the delivery of the notice, with intent to be served, then the writ of attachment cannot issue before the notice, and in the case at bar, it is irregular, and must be quashed. But such a construction does not appear to us necessary, and the attachment was well enough issued after the petition was filed, and before the notice. [*312] This course would compel the plaintiff to serve his notice before the next term of the court; for, if this should not be done, the attachment would then be quashed, of course, and the party suing out would render himself liable on his bond for suing out and levying an attachment without prosecuting an action.

We do not intend to intimate here that there may be any unnecessary delay, but the several steps should appear to be parts of the same transaction and proceedings.

In the present case, there is another fact which strengthens the position above taken. The attachment was sued on Sunday, and the affidavit required by statute in such case is made. Those things which were requisite for obtaining the attachment on that day were done, and none others, the party probably supposing that the issuance of process, or notice, would be illegal. This was issued, and put into the officer's hands the next day, which was as soon as was practicable. The case stands upon its own facts, and can scarcely serve as a precedent for one in other circumstances. * * *

Affirmed.

"No court can be opened, nor any judicial business transacted on Sunday, except: * * * 4, and such other acts as are provided by law." [Iowa Stat. Rev. 1860, § 2686.]

"Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day." [Ch. 14, 10 Gen. Assembly; Code, 1873, § 2952.]

This case is cited and followed in the following cases similar to it except that the attachment was not on Sunday. *Bell v. Olmstead*, 18 Wis. 75; *Hoagland v. Wilcox*, 42 Neb. 138, 60 N. W. 376. See also to the same effect *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505; *Cosh Murray Co., v. Tuttle*, 10 Wash. 449, 38 Pac. 1134; *McDonald v. Alanson Mfg. Co.*, 107 Mich. 10, 64 N. W. 730; *Webb v. Bailey*, 54 N. Y. 164; *Blackman v. Wheaton*, 13 Minn. 326, Gil. 299. "The chief utility of an attachment consists in the writ being served in time to prevent a delinquent debtor from placing his property beyond the reach of the creditor. It would be unfortunate, indeed, if the writ could not issue until the debtor should have notice of the proceedings by service of summons." *Schuster v. Rader*, *supra*.

How Late the Writs May Issue.

MARINER v. COON, in Wis. Sup. Ct., Jan. Term, 1863—16 Wis. 465.

Action to recover real estate. Plaintiff claims under a judicial sale on execution on a judgment against the defendant. Plaintiff offered in evidence the execution and return indorsed thereon and the marshal's deed executed pursuant to such sale. Defendant objected to the admission of them on the ground that the execution was not issued within two years after the rendition of the judgment. The circuit court sustained the objection, excluded the evidence, and directed a verdict for the defendant. From the judgment entered thereon plaintiff appeals.

DIXON, C. J. The question presented by this case is, whether an execution issued upon a dormant judgment, without leave of court, is void or only voidable. If void, no sale can be made under it, and the purchaser acquires no title; but if voidable, the sale may be valid, notwithstanding the omission to obtain leave. We are of opinion that such an execution is merely voidable, and therefore that no advantage can be taken of the irregularity, except in a direct proceeding to set it aside.

The rule at common law is well known. If the plaintiff failed to take out execution within a year and a day, extended in many of the states, by statute, to two years from the time the judgment became final, it could not be regularly issued thereafter,

without reviving the judgment by *scire facias*. The rule was founded upon a presumption that the judgment had been satisfied, which drove the plaintiff to a new proceeding to show that it had not; and yet it was invariably held, that an execution taken out after that time, and without *scire facias* or judgment of revivor, was not null, but simply irregular. The defendant might, if he desired, interpose and set it aside upon motion; but if he neglected to do so, it was considered an implied admission that the judgment was still in full force. He might waive the irregularity, and thus avoid the expense of a *scire facias*. See *Erwin's Lessee v. Dundas*, 4 How. 79; and *Doe v. Harter*, 2 Carter (Ind.) 252, and the cases cited.

But the code (§§ 192 and 193 of the original act, now §§ 1 and 2 of ch. 134, R. S.) prescribes a different practice, and it is upon this that the counsel for the defendants chiefly relies. When the execution in controversy [*469] was issued, the period was fixed at two years from the entry of judgment. It is now enlarged to five. Laws of 1861, ch. 140. After that period has elapsed, it is provided that "an execution can be issued only by the leave of the court, upon motion," etc. This language is said to take away all power, except it be acquired in the manner prescribed, and to render every process issued in contravention of it void for want of jurisdiction. Were we to suppose the legislature to be speaking with reference to the question of power, then there is nothing in their language inconsistent with the position of counsel and we might adopt his views. But we are not at liberty to act upon this supposition. Upon looking to the previous state of the law, and to other provisions of the act, we see very clearly that it was a matter of practice with which the legislature were dealing, a question as to the *form* of proceeding which should thenceforth be pursued, and not one which necessarily affected the jurisdiction in case the new practice was not complied with. By § 331 of the original act (§ 1, ch 160, R. S.), the writ of *scire facias* is virtually abolished. The remedies heretofore obtainable in that form may be obtained by civil action under the provisions of the code. But by the particular provision of § 2, ch. 134, above referred to, the remedy by motion to revive a judgment which has become dormant by lapse of time, is substituted. Hence the peculiar significance of the word "only," upon which the counsel insists so strongly to show a want of jurisdiction. The execution shall be issued *only* upon motion; otherwise the plaintiff might resort to the remedy by civil action. It appears,

therefore, that the consequences of a departure from the practice prescribed by statute are the same as they were at common law. It is a simple irregularity, which the execution debtor may waive, and which it seems he did do in this case.

Judgment reversed, and a new trial awarded.

Effect of Death of a Party.

PARSONS v. GILL, in King's Bench of England, 3 Will. 3, A. D. 1701—
1 L. Raym. 695, 1 Comyns 117.

Mr. Broderick made a motion to refer the regularity of an execution to be examined by the master, &c., alleging it to be irregular for this, that the writ of execution bore teste of the first day of Hilary term, returnable the Easter term following, and the judgment was of Hilary term; so that the writ of execution might have been sued perhaps before the judgment given. Besides, that the judgment was signed after the death of the defendant, for the defendant died the first of April, and the judgment was signed the second of April, which being before the essoin day of Easter term, related to Hilary term; and therefore altogether irregular. But the motion was denied, because (*Per Curiam*) the practice is always so and well enough.

PEOPLE FOR USE OF KELLY v. BRADLEY, in Ill. Sup. Ct., June Term, 1856—17 Ill. 485.

SKINNER, J. This was an action of debt against Bradley and others, on the bond of Bradley as sheriff of Cook county. The plaintiff assigned for breach of the conditions of the bond, that Kelly and Blackburn, on the 30th day of October, 1854, in the Cook county court of common pleas, recovered a judgment against one Harper, upon which judgment, execution on the same day issued against the goods and chattels of Harper, and which execution was delivered to Bradley, as such sheriff, to execute, on the 31st day of October, 1854; that Harper had goods and chattels within said county, liable to be levied upon and sold in satisfaction thereof, of sufficient value to satisfy the same, and that Bradley refused to levy the execution of said goods and chattels. The plea denies the averment that there were goods and chattels of Harper liable to be levied upon and sold under the

execution. The cause was submitted to the court for trial, upon an agreed state of facts, from which it appears, that the execution issued and bore date the 30th day of October, 1854; that Harper, the defendant in execution, died on the evening of the same day; that the execution was delivered to Bradley to execute on the 31st day of the same month, and that he refused to levy the same of the goods and chattels of which Harper died possessed, on the ground that Harper was dead at the time the execution came to his hands.

If the goods and chattels, of which Harper died possessed, were liable to be levied upon and sold to satisfy an execution against him issued before his death, but which was delivered to Bradley to execute on the day after his death, then the judgment should have been for the plaintiff, otherwise for the defendants. It seems that by the common law the goods of a defendant were bound from the *teste*, that is, the date of the issuing of the execution; and that although the defendant died after the *teste*, and before the writ of execution came to the hands of the sheriff, it might have been levied of the goods of the defendant at the *teste* of the writ, in the hands of third persons, or of the executor or administrator. 4 Comyn's Digest, title "Execution," D. 2; *Audley v. Halsey*, Cro. Car. 149; 1 Rol. 893, 1. 23.

Our statute provides that "no writ of execution shall bind the property of the goods and chattels of any person against whom such writ shall be issued, until such writ shall be delivered [*487] to the sheriff, or other officer, to be executed." R. S. 300, § 8; *ibid.* § 1.

The common law is, therefore, changed, and neither the judgment nor execution is a lien upon the goods of a defendant, until execution is *delivered* to the officer whose duty it is to execute its commands. In New York the statutory provision in this respect is the same as ours, and it is there held, that executions only bind the goods from the time of delivery of the writ to the sheriff. *Haggerty v. Wilber*, 16 Johns. 287; *Cresson v. Stout*, 17 Id. 116; *Lambert v. Paulding*, 18 Id. 311; *Beals v. Allen*, Id. 363.

When the execution in this case came to the hands of Bradley there was no such person in being as the defendant named therein; there was no existing lien upon the goods by virtue of which they could be seized, and other rights had intervened which could not be affected by a subsequent delivery of the execution to the sheriff. Under our law, the widow had become entitled to certain of the goods and chattels of the deceased, and the bal-

ance was subject to be applied to the payment of his debts generally, according to a statutory rule wholly inconsistent with the existence of any lien or priority in favor of the judgment or of the execution. *Welch v. Wallace*, 8 Ill. (3 Gil.) 490; *Judy v. Kelley*, 11 Ill. 211.

We hold that Bradley could not lawfully have levied the execution, which came to his hands after the death of Harper, upon goods and chattels of which Harper died possessed, and, therefore, in refusing to do so, violated no official duty.

Judgment affirmed.

Writ of Possession Exceptional.—"The judgment bound the land of which the writ directed possession to be delivered, and the office of the writ was simply to carry the judgment into effect with reference to that particular piece of land. Formerly such a writ usually had no return day. (Crocker on Sheriffs § 575.) The plaintiff had the right to take possession of the land by virtue of the judgment, without any writ, if he could peaceably do so. We think that in such a case the command to return the writ within sixty days is merely directory. Such an execution is not analogous to an execution against personal property, where a levy is analogous to a proceeding to sell real estate under an execution, which may be had without any previous levy, and which appellant's counsel concedes in his brief may be taken after the return day of the writ." *Witbeck v. Van Rensselaar*, (1876), 64 N. Y. 27, 31.

CLERK v. WITHERS, in King's Bench of England, Mich. Term, 3 Anne, A. D. 1705—1 Salkeld 322, 2 L. Raymond 1072, 6 Mod. 290, 11 Mod. 35.

Decided before Holt, C. J., Gould, Powys, and Powell, JJ. This report is according to Salkeld. For arguments in full and opinions seriatim, see 6 and 11 Modern.

An administrator recovered judgment, and sued out a *fiery facias*, and delivered it to the sheriff the first of August; the sheriff seized the defendant's goods, and afterwards the administrator died; the sheriff returned, that he had seized goods to the value, *sed quod remanent in manibus pro refectu emptorum*; and afterwards the said sheriff was removed, and a new sheriff sworn in. And now the defendant sued a *scire facias* against the old sheriff, to have his goods again; and judgment being against him in common bench error was brought here, and objected for the plaintiff in error, that the execution was abated, and nobody could perfect it; not the executor of the administrator, because he came in *in auter droit*; and the administrator *de bonis non* could not, for he was paramount; and that this was not within the 17 Car. 2. c. 13, for that only regarded the cases after verdict. But

Per Curiam. This *scire facias* is not maintainable; and these points were resolved:

1st. That the plaintiff's death did not abate the execution, and that the sheriff, notwithstanding that, might proceed in it; because the sheriff has nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder; [*323] besides, an execution is an entire thing, and cannot be superseded after 'tis begun.

2dly. That the old sheriff has not only authority, but is bound and compellable to proceed in this execution; for the same person that begins an execution shall end it, and a *distringas nuper vicecomitem* lies. Of these there be two sorts; one is to distrain the old sheriff to sell and bring in the money; the other to sell and deliver the money to the new sheriff to bring into court; which plainly shows his authority continues by virtue of the first writ. *Vide* Rastell Ent. 164; Thes. Brev. 90; 34 H. 6, 36.

3dly. That when the sheriff had seized, he was compellable to return his writ, and made himself liable at all events (acts of God excepted) to answer the value of the goods according to his return; 3 Cro. 390; 1 Cro. 459; and by the seizure the property was divested out of the defendant, and in abeyance.

4thly. They held, that the defendant was discharged; because the plaintiff having made his election, and the defendant's goods being taken, no farther remedy could be had against the defendant, but against the sheriff only. He may be compelled to return his writ: If it be a false return, an action lies; if he returns a seizure and sale, he has the money; if he has seized and not sold, that does not discharge but excuse the sheriff, and therefore the plaintiff may have a *renditioni exponas* to the sheriff, if he continues in office; if out of office, a *distringas nuper vicecomitem*, and then he must sell.

5thly. That since by the 17 Car. 2, c. 13, an administrator *de bonis non* may commence an execution on a judgment obtained by an executor or administrator, it is but reasonable, and within the equity of that act, that an administrator *de bonis non* should be permitted to perfect an execution thus begun; for the right now comes to him.

Judgment affirmed.

The third and fourth points were unnecessary to the decision, and were not well resolved, as the student will discover by consulting *Green v. Burke*, post, 205, 210.

Effect of Prior Arrest, Levy, Etc.

BODREUGAM v. ARCEDEKNE, in the Cornish Iter. 30 Edw. I, A. D. 1302—Year Book, 30 & 31 Edw. I, p. 106.

Henry de Bodreugam complained by bill, that Thomas le Arcedekne tortuously and against the peace of our lord the king, came with force and arms at a certain day, year, and place, and assailed, beat, and wounded him, and his goods, &c.; and that tortuously and against the peace, he took away William, son and heir of B., who was in his wardship, to his damage, &c. *Middleton* denied the tort and force, and as to its being against the peace of our lord the king, and the coming, &c. * * * The inquest said that * * * strife arose between them, and Henry was beaten and wounded as he complains of having been. * * * *Middleton*: Sir, there are others who committed the trespass, and against whom the plaintiff can recover; we entreat you to take this into consideration. *BRUMPTON* [J.]: Know that none of the others shall ever take exception by reason of this judgment, for he has his action against each one, and each one is liable to the whole, and he shall recover his damages against each one severally, if he choose to sue him; and for as much as he was convicted of having gone armed in company with Sir Ralph, and his followers entered the house as before-mentioned, thereby it will appear that he was an assenting party to what took place, and we consider him altogether as a principal, and the court adjudges that Henry do recover his damages which are assessed at 100 marks, and that Sir Thomas do go to prison. * * * On another day Sir Thomas was brought from prison, and he prayed mainpernors. *BERREWICK* [J.]: Have you arranged with the plaintiff? *Thomas*: No, Sir. Then Sir Henry and Thomas went out; and Henry gave Thomas a respite of a fortnight, provided that he should in the mesne time abide by the judgment and remain under the jurisdiction of the justices. *BERREWICK* (to the plaintiff): Know that if by your consent he is once let out of prison, we shall never send him back by virtue of this our present judgment; but as to the recovery of damages, which is given by statute, if he remain continuously in custody, you shall have execution whenever you please.

MILLER v. PARNELL, in Common Pleas of England, 1815—2 Marsh. 78, 6 Taunt. 370, 1. Eng. Com. Law 658.

Before Gibbs, C.J., Heath, Chambre and Dallas, JJ.

Rule *nisi* to discharge Parnell out of custody, he having been taken on *ca. sa.* after plaintiff had sued out and levied *fi. fa.*

PER CURIAM. No doubt, a plaintiff having sued out a writ of *fi. facias*, may, if he pleases, omit to execute the *fi. facias*, and take out a writ of *capias ad satisfaciendum*, and execute that before the *fi. facias* is returned or returnable. But there is,

also, no doubt that if the plaintiff does execute his *feri facias*, he cannot have a writ of *capias ad satisfaciendum* till the *feri facias* is completely executed and returned. This is a middle case. So far as the defendant is concerned, the goods, to the extent of their value, have been levied; and the question is, whether the plaintiff, after taking them, may change his mind, and sue out a writ of *capias ad satisfaciendum* without returning his former writ. If [*372] this might be, it would confer a power that might be much abused. If the *feri facias* be returned, there is something to bind the plaintiff, and to limit for how much he shall have the body, by showing how much he has already gotten. If a plaintiff might take goods under a *feri facias*, and hold them a month, or the greater part of the long vacation, and then change his mind, and say, "I will not sell, but will take the body of the defendant under a *capias ad satisfaciendum*," it might be the engine of very great oppression. The plaintiff may, by the practice of the court, sue out both these processes together, if he will, and may use either the one or the other, as he sees advisable, but by using the *feri facias*, first, he makes his election, and after having so elected, he cannot use the other process, till after the return of the first. We, therefore, think, that this writ of *capias ad satisfaciendum*, being sued out after the *feri facias* had issued and after the sheriff had taken the goods under it, and before its return, cannot be supported. *Rule absolute, but on the terms of bringing no action against the sheriff.*

Very similar facts and ruling in *Cutler v. Colver*, 3 Cowen (N. Y.)

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COOPER v. BIGALOW AND SEARLS, in N. Y. Sup. Ct. New York, May, 1823—1 Cowen 56.

Motion by Cooper that so much of his judgment for \$124.68 against Bigalow and Searls as would be necessary to satisfy the judgment of Bigalow for six cents and costs against said Cooper and one Henry for assault and battery, be set off against said latter judgment. Both causes were in this court.

Footnote, for Bigalow and Searls, objected that the first judgment was satisfied by imprisonment of defendants therein.

PER CURIAM. The bodies of the defendants, Bigalow and Searls, being in execution, this is, in judgment of law, a satisfaction of the debt. We find this principle perfectly well settled, so

much so, that a commission of bankruptcy cannot issue, upon the proof of a debt for which the bankrupt is in execution. *Barnaby's Case*, Strange 653. It is no answer to say that the plaintiff may hereafter be entitled to a new execution, by the death of the defendants. At common law, this could not be done. *Foster v. Jackson*, Hobart 52. But the *statute* makes it an exception. And the case mentioned of a discharge under the insolvent act, is also by statute. We, therefore, deny the motion. Motion denied.

A motion similar to the above was denied, though the defendant taken in execution had died in prison. *Williams v. Evans*, 2 McCord (S. Car.) 123. The motion in *Cooper v. Bigalow*, above, was renewed at the next term of court, and granted on proof that the prisoners had obtained their discharge from prison under the insolvent act. *Cooper v. Bigalow*, 1 Cowen 206. In England on rule nisi a judgment debtor taken in *ca. sa.* was released on crediting the amount of the judgment and costs on a larger judgment against the opposite party who had previously been taken and was still held in execution thereon. *Peacock v. Jeffery*, 1 Taunton 426. See also *Simpson v. Hawley*, 1 Maule & Sel. 696. But in a later case, that defendant was in execution, was held, on demurrer, to be a good replication to a plea of set-off on a judgment. *Taylor v. Waters*, 5 Maule & Sel. 103, 2 Chitty 303.

Defendant having died in execution, new execution against his executors on *scire facias* was denied. *Foster v. Jackson*, Hobart 52, Moore 857; *Williams v. Cutteris*, Croke Jac. 136. These decisions induced the statute, 21 Jac. 1 ch. 24, by which it was provided that if defendant die in execution the plaintiff may have a new execution.

If the debtor taken in *ca. sa.* be discharged by agreement, the plaintiff can have no further benefit of his judgment, though the discharge was expressly "without prejudice" to the plaintiff's rights. *Magniac v. Thomson*, 2 Wallace Jr. 209, Fed. Cas. No. 8957; *Cattlin v. Kernot*, 3 Com. Bench (N. S.) 796, 91 Eng. Com. Law 796.

ROBERTHON v. NORROY, Hilary term, 6 & 7 Edw. VI, A. D. 1553—
1 Dyer 83a.

A man sued another before the mayor, and a third person was indebted to the defendant, and judgment was given against the other as garnishee under the custom of London. Notwithstanding the judgment if no execution be sued out against the third person, the plaintiff may resort back to have judgment and execution against the defendant, who is his principal debtor, and he may also sue the third person for his debt notwithstanding the judgment unexecuted.

BRICE v. CARR, in Iowa Sup. Ct., June 12, 1862—13 Iowa 599.

WRIGHT, J. Complainant seeks to restrain the collection of a judgment. The gravamen of the bill is, that the creditor garnished a [*600] debtor of the defendant in execution, and held him so long under and by virtue of that process, that he, in the meantime, proved to be insolvent; that complainant thereby lost his debt, whereby he was in equity discharged from all liability on said judgment.

We think the court was justified in concluding that there was no such delay, on the part of plaintiff in the garnishee proceedings, as to entitle complainant to the relief asked. And if unnecessary delay did occur, complainant could have prevented this by paying his debt, as was his duty, and thus releasing the garnishee. This proceeding did not absolve complainant from his duty to discharge his debt. He had something to do. He could not remain passive.

Affirmed.

To same effect see *Dickinson v. Clement*, 87 Va. 41, 12 S. E. 105; *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476; *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13,315; *McElwee v. Jeffreys*, 7 S. Car. 228; *Wade v. Watt*, 41 Miss. 248.

Without mentioning *Brice v. Carr*, or any of the cases above cited, the supreme court of Iowa, in a recent case, entered satisfaction of the principal judgment, on petition of the judgment debtor showing that on garnishments judgments had been rendered against the garnishees equal in amount to the main judgment, saying that if the creditor could not realize on the garnishment judgments he must prove it. *Bowen v. Port Huron E. & T. Co.*, 109 Iowa 255, 80 N. W. 345, 47 L. R. A. 131, 77 Am. St. Rep. 539. And see: *Coe v. Hinkley*, 109 Mich. 608; *Doughty v. Meek*, 105 Iowa 16.

In overruling a demurrer to a declaration in debt on judgment because it appeared thereby that a judgment had been recovered thereon against garnishees, the court said: "The judgment against Higgins (defendant) is separate from, and independent of, that against the garnishees. It is true, both judgments are for the same demand, and if either is satisfied the plaintiff would not be permitted to enforce the collection of the other. But until one is satisfied, the plaintiff's remedy on each is as ample as though no other judgment had been rendered." *Price v. Higgins*, 11 Ky. (1 Litt.) 273.

MOUNTNEY v. ANDREWS, in Queen's Bench, Trinity, 33 Eliz., A.D. 1591—Cro. Eliz. 237.

Scire facias upon a judgment in debt. The defendant pleads, that upon a *fi cri facias* directed to the sheriff of the county of Leicester, for levying the debt, he by force of it took divers sheep of the defendant's for the debt, and yet detaineth them. And

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ruled a good plea *per curiam*; although he doth not : the writ is returned, and although the writ is condi-
quod habias denarios, &c., for the plaintiff hath his
ainst the sheriff, and the execution is lawful, which the
cannot resist. [*Rook v. Wilmot*] Cro. Eliz. 209.

BURKE, in N. Y. Sup. Ct., May, 1840—23 Wend. 490.

vin by Green against Burke for nine acres of wheat
by Green on execution in favor of himself and another
rke. From judgment on verdict for defendant plain-
s.

idant claimed that plaintiff acquired no title by virtue
chase at the sale by constable Rood, because the judg-
satisfied by reason of a levy on three colts under a pre-
ution thereon, which had been returned and the levy
l by the constable Stevenson because he was under age.

N, J. * * * There is no dispute that the title to the
l been acquired by the plaintiff, in virtue of his pur-
er the execution held by *Rood*, unless the previous levy
andonment of the colts by *Stevenson*, worked a satis-
the judgment. The latter held a regular execution;
a levy which was sufficient in point of form, on proper-
quate value. It is supposed by the plaintiff's counsel
was no levy, because no act was done which would,
e protection of the execution, have been such a taking
ts as to amount to a trespass. This was spoken of as
on of a levy, in *Beekman v. Lansing*, 3 Wend. 446, 450;
there said the court were inclined to consider it an es-
erion. We are not disposed to deny that it is so. The
e also said that the officer must take actual possession
is in his power; but he need not remove the goods.
be left with the defendant; nor did the court insist
ventory was necessary. The case cited was well con-
nd on the question of what acts of the officer alone
stitute a levy, highly authoritative. * * * The acts of
were all summed up in his going to the house of the
[*493] debtor with the execution in his pocket, but
ven to apprise him that he had come to make a levy.
says that he should have done some definite act, in re-
e goods; something which could be known to the debt-

or and communicated to his landlords. That the latter, at least, were not to be affected by a mere mental levy. *Id.* 451. This question is well considered by Taylor, C.J., in *Doe, ex, dem. Barden, v. M'Kinnie*, 4 Hawks (N. Car.), 279, 280. In short, as between the sheriff and third persons, he shall not be allowed to proceed in so secret a manner, as to cut off all probable means of their knowing how to deal with the debtor in respect to his goods, whether as purchasers from him, or as his landlords claiming rent, or as subsequently levying creditors. *Vid. Bliss v. Ball*, 9 Johns. (N. Y.) 132. *Haggerty v. Wilber*, 16 Id. 287. As it respects the defendant himself, too, the proceeding should be such as to apprise him of the step; and if he be not informed of it, at least a reasonable time before the sale, yet the sheriff's acts should be such as not to leave the inference of intentional concealment. The defendant should have a fair opportunity to make the proper arrangements for preventing a sacrifice of his property. The proceedings of the officer being such as are naturally calculated to avoid injurious consequences, the form in which he chooses to make the levy is totally immaterial. Holding the process, having the goods in his power, and directly declaring his intent, or doing what is equivalent, as taking an inventory, or making a memorandum of the levy, satisfy that branch of the rule which directs a change of possession. Speaking is always an important part of the *res gestae* which constitute such a change. In *Wood v. Vanarsdale*, 3 Rawle (Pa.), 401, the sheriff merely entered a store of goods, and declared his intention to levy; and although the defendant expressed his dissatisfaction, and did not act to waive formality, the seizure was held to be complete, notwithstanding the officer returned *nulla bona*. He had put no one in possession, taken no inventory, and never, after declaring the levy, interfered with the goods in the least. The court held distinctly, citing the New York cases, that none of these acts were necessary; and the sheriff [*494] having returned the execution and abandoned the levy, by consent of the plaintiff's assignee, the judgment was declared to have been satisfied. In *Trozillo v. Tilford*, 6 Watts (Pa.) 498, the sheriff did not see the goods at all, nor did he go near them; but the defendant gave him a schedule, by arrangement, which he agreed should be considered a levy; and that was held sufficient, even against a third person, claiming as the defendant's vendee. *Gilkey v. Dickerson*, 3 Hawks (N. Car.), 293, is not incompatible with *Trozillo v. Tilford*, nor with the common notion of what acts constitute a levy. There the coro-

ner merely called on the defendant and asked him for a list of goods which he might sell to satisfy the execution; and the defendant gave him a list of negroes, sufficient in value; but the coroner never saw them, and the defendant afterwards took them out of the county and sold them. The coroner therefore levied again on two other negroes, which the defendant afterward sold to Gilkey, who insisted on his right as vendee, because the judgment had been satisfied by what he called the first levy. Held that it had not; and Taylor, C.J., gave the reason. He said: "Had the property been present when the list was delivered, and the coroner had signified that he held it bound to answer the execution, and there was no opposition to his possessing himself of it, had he so desired, it would have amounted to a levy." It will be perceived that no evidence was given whether the negroes were anywhere within miles of the coroner; and he did nothing and said nothing indicating that he considered the list a levy. Beside, according to our cases, the eloignment and sale of the negroes by the defendant would have warranted the second levy irrespective of the question whether the first had been regular or not.

An actual taking of possession, therefore, does not necessarily imply an actual touching of the goods; but merely such a course of action as, in effect, is calculated to reduce them to the dominion of the law. They are then considered as in the custody of the law; and a degree of constructive force is imputed which at once entitles the party whose goods are thus seized to his action of trespass, if the officer [*495] be destitute of authority. Whether the rule requiring that to be done which may amount to a trespass, is thus satisfied, we have examined more at large in the case of *Connah v. Hale*, 23 Wend. 462. I have said more upon the point now, because *Bailey v. Adams*, 14 Wend. 201, has been pressed upon us as implying that the property must in some way be manually interfered with. There the constable went with his execution to the man who had possession of the property, a wagon, claimed to levy on it as belonging to the defendant in the execution, making a note of the levy, and leaving the wagon, with directions that the man should take care of it. Ten or twelve days after, becoming satisfied that the execution debtor had no title, he offered to relinquish his claim to the plaintiff, who was the real owner; but the latter refused to accept the wagon, and brought trover against the creditor who had directed the levy. The acts of the constable were held not to have been a conver-

sion; the court remarking that the actual possession of the property was not changed, and the plaintiff had been put to no charge concerning it. The learned judge who delivered the opinion of the court, referred in a general way to *Reynolds v. Shuler*, 5 Cowen, 323, and *Bristol v. Burt*, 7 Johns. R. 254. The question was considered in those cases; but, with deference, I understand them both to hold that such acts as were proved in *Bailey v. Adams*, would clearly amount to a conversion; and that even an actual acceptance of the goods by the owner, much less a mere offer to deliver them, could no farther qualify the wrong, than by reducing the damages. *Wintringham v. Lafoy*, 7 Cowen, 735, was not cited. That case held the officer liable in trespass *de bonis asportatis*, though he merely claimed to have levied, taking an inventory and receipt. The decision was also incompatible with the rule laid down in *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 Id. 631, 633, and many other cases. The injury being complete, it is clear that a tender of the property will not affect the plaintiff's rights. *Clark v. Hallock*, 16 Wend. 607; *Hanmer v. Wilsey*, 17 Id. 91. It is said in the latter case, and so are all the authorities, that even an acceptance by the plaintiff, [*496] goes to the question of damages only. There is no such thing as waiving a cause of action after it has once arisen. And in the case at bar, there is no question that either trespass or trover would have lain by Burke against Stevenson, the minor, notwithstanding his abandonment of the levy, unless he was protected by the process. * * * In short, there was no such thing as Stevenson purging his own wrong by merely omitting to follow up the trespass he had committed. He went to the field with the defendant, for the purpose of levying on the colts; and made a note of the levy on the back of the execution. He not only had the goods in view, and the intention to levy, but the defendant, the execution debtor, had notice, and co-operated in, and submitted to the act.

Prima facie, then, the debt was, or might have been, according to the event, satisfied by the levy. And many cases are cited by the defendant's counsel to show that, although the constable gave it up, and returned the execution to the justice, utterly refusing to proceed, yet the plaintiffs were concluded and could not sue out a new execution. The ground taken is, that the judgment was unqualifiedly satisfied by the levy. Admitting that the constable had the power to levy, then, so long as he kept the act good, and followed it up, something near the consequence con-

ended [*497] for undoubtedly followed; but he withdrew, without the consent or knowledge of the plaintiffs, and I am not prepared to admit that, in such a case, the creditor is bound to look to the officer alone for his remedy. I know that learned judges use language in the cases cited, which is very strong. They say the levy is a satisfaction of the debt; but every book they cite, and every case they decide, show under what qualifications they speak. They all go back to *Mountney v. Andrews*, Cro. Eliz. 37 [ante]. There the plaintiff brought a *scire facias quare executionem non*, and the plea was, not simply that the sheriff had levied, but that he *had taken divers sheep* of the defendant for the debt, *and yet detaineth them*. The reason given was, that "the plaintiff has his remedy against the sheriff, and the execution is lawful which the defendant cannot resist." The value of the sheep was not mentioned; and surely it cannot be pretended that such a step shall be taken as a satisfaction *per se*. Suppose the sheep had been sold, bringing only half the judgment; was the remedy by action, *scire facias*, or execution gone for the residue? I need not cite authorities to show that such a consequence would not follow. It would be absurd, and contrary to all practice. The doctrine laid down in *Clerk v. Withers*, 1 Salk. 322 [ante], the case commonly relied on, is, that "the defendant's goods being taken, no further remedy could be had against the defendant, but *against the sheriff only*." The reason given is that "he may be compelled to return his writ; if it be a false return, an action lies; if he returns a seizure and sale, he has the money; if he has seized and not sold, that does not discharge, but excuse the sheriff, and therefore, the plaintiff may have a *restitutioni executionis*," &c. The doctrine thus laid down was not material, at least not essential to the decision; and on referring to the same case in 2 Ld. Raym. 1072, a contemporary report, the whole will be found to lie in a dictum of Gould, J., founded on a curtailed statement of *Mountney v. Andrews*. In this he does not present the plea there as one of *detainer*, but of *levy* only. It is impossible to say that a verdict for the defendant would have operated as more than a temporary bar of execution. The [*498] seizure works no change of interest beyond vesting a special property in the officer. The general property still remains in the debtor. *Wilbraham v. Snow*, 2 Keble 588, 1 Siderfin, 438; and *id.* *Ayer v. Aden*, Yelverton 44, (Cro. Jac. 73). The goods are but a collateral security; and the seizure is, *per se*, neither a payment nor satisfaction absolute, but only *sub modo*. Yet from *Clerk v.*

Withers, comes a progeny of *dicta* couched in the same general language. Parsons, Ch. J., in *Ladd v. Blunt*, 4 Mass. 402, puts it that when sufficient goods are seized the *debtor is discharged*, even if the sheriff waste the goods, &c.; for, by lawful seizure the debtor has lost his property in the goods." None of this was necessary; for he was merely examining whether a levy on *land* would satisfy the debt, and held it would not, and in such case, he concludes it is no satisfaction, because till the land is delivered to the plaintiff, the title of the defendant is not divested, and the judgment is unsatisfied. We have held the same thing. *Shepard v. Rowe*, 14 Wend. 260, 262. And yet we have often taken it for granted that the sheriff may, nay must levy on land as well as goods; *Jackson ex Dem. Sternberg v. Shaffer*, 11 Johns. 513, 517; *Jackson ex Dem. Carman v. Roosevelt*, 13 Johns. 97, 102; and we have, in several cases, allowed him fees for such levy, which implies that we consider it an incipient execution of the process, the same as a levy on goods. *Parsons v. Bowdoin*, 17 Wend. 14, 15, and the cases there cited. Are these cases all wrong? If not, a levy on land is more than a levy on goods, for the lien of the judgment conspires with that of the execution. In neither case is the debtor's property absolutely divested till a sale; but in both it is partially displaced, though the sheriff acquire no interest in the land. Take it that the sheriff holds a mere naked power in respect to the land, like a tax collector; *Catlin v. Jackson*, 8 Johns. 520, 546; take it that the power or levy dies with him, or expires when he goes out of office, or is gone with the return day of the *fi. fa.* according to the cases in North Carolina; *Doe, ex dem. Borden v. M'Kinnic*, 4 Hawks (N. Car.), 279; *Frost v. Etheridge*, 1 Dev. (N. Car.) 30; *Den, ex dem. Tayloe v. Fen*, 1 Dev. 295; *Tarkinton v. Alexander*, 2 Dev. & Batt. 87, and the cases cited by Gaston, J.; yet you have a lien by virtue of the judgment, surer in its effect than can arise from a mere levy on personal property; and the distinction between the effect of discharging the lien in one or the other case, is merely technical. The goods levied on are a pledge for the debt, like a distress for rent in the hands of the landlord. That too works a suspension of all other remedy; and may mature into a satisfaction. *Vid. Wallis v. Savill*, 2 E. Lutw. (Eng.) folio p. 1532, Eng. Ed. 649; *Hutchins v. Chambers*, 1 Burr. 589; Bradby on Distresses, 130. A voluntary relinquishment of a sufficient distress would probably bar all further remedy by the act of the landlord, if not an action for the rent. And yet in al-

most every other point of view, the goods are regarded as no more than a collateral security.

Our cases appear to have drawn various consequences from *Clerk v. Withers* [ante]; but I apprehend none of them admit the levy to operate as an absolute satisfaction. *Reed v. Pruyn*, 1 Johns. R. 426, was where the sheriff had paid the money. The court there cite *Ward v. Hauchet*, 1 Keble, 551, to show that the sheriff taking security for the debt, would discharge it: but in that case the plaintiff consented to the sheriff taking a bond. Nothing is said of a levy, and the rule there, as stated by counsel and agreed to by the court, is clearly not law. Merely taking security by bond will not discharge a judgment, though I admit that security taken in due course of execution, even without the plaintiff's assent, will have the same effect as a levy—for instance, if it be taken by way of a receiptor or by bond in place of the goods seized. *Bank of Orange County v. Wakeman*, 1 Cowen, 46, and note. In *Hoyt v. Hudson*, 12 Johns. 207, the action was against the constable, who had seized the goods and taken a receiptor. It was held that he could not levy again. That was like a sheriff suffering a voluntary escape. He cannot make recaption of his own head. In *Ex parte Lawrence*, 4 Cowen, 417, the levy on personal property still pending was held to take away the lien of the judgment on the debtor's real estate, and so the creditor could not redeem. The court say the levy *extinguished* the judgment, citing the previous cases. In *Jackson, ex dem.* [*500] *Merritt v. Bowen*, 7 Cowen, 13, the same point was decided; the *fi. fa.* having been returned by direction of the creditor, and the levy thus discharged. *Cornell v. Cook*, *id.* 310, 315, is a mere recognition of the general doctrine by Savage, Ch. J. In the case of *Wood v. Torrey*, 6 Wend. 562, the assignee of the judgment himself stood receiptor to the sheriff; yet he was allowed to make a second levy as against the defendant, because the latter had caused the eloignement of the goods. * * * An actual payment to the sheriff would probably be deemed a payment of the debt. The judge seems to concede this in *Ontario Bank v. Hallett*, 8 Cowen, 192. That a payment to the sheriff is a good discharge of the immediate defendant was agreed both in *Dyke v. Mercer*, 2 Shower (Eng.) 394, and *Clerk v. Withers*. [So held in *Matter of Dawson*, 110 N. Y. 114, 17 N. E. 668.]

Thus, after all that has been said, we are to this day destitute of any direct adjudication that *levy* alone absolutely extinguishes or satisfies a judgment, as payment of the money would

do. The levy on a single sheep, according to the *dicta* in Salkeld and Raymond, would satisfy a thousand pounds; and so perhaps of several detached *dicta* since that time. The gross absurdity of such a rule has led the judges, in all the later cases, to speak in more qualified terms; such as that the goods must be of *sufficient value* to satisfy the debt; and again, if the debtor eloin them, the levy is not a satisfaction. Nor do I believe any judge would, at the present day, hold the plea in *Croke* to be more than a temporary [*501] bar of further execution; a mere ground for setting it aside on motion. Would the judgment for the defendant on that plea have barred an action of debt? Might not the plaintiff have replied that the sheep sold for less than the judgment; and so recover the balance? To an action of debt, the plea could have been nothing more in effect than a plea in abatement.

What then, after all, does the rule amount to? Merely this: that the levy is a satisfaction *sub modo*. It may operate as a satisfaction, and must be fairly tried; but if it fail, in whole or in part, without any fault of the plaintiff, he may go to his farther execution. He must fairly exhaust the first; and while that is going on, he can neither sue on the judgment, nor have another *fi. fa.*, nor a *ca. sa.*, nor can he redeem lands sold on another judgment. The plaintiff may, by tampering with the levy himself, lose his debt—as if he release property from arrest, which is sufficient to pay the debt. Even a distress which answers only part of the rent may generally be followed up by distraining again; and might, I apprehend, by the common law. *Vid. Bradby, and cases before cited in connection with him.* In the still higher remedy by *capias ad satisfaciendum*, if the sheriff allowed the debtor to escape without the previous consent of the plaintiff, the latter might always, even before the declaratory statute of 8 and 9 Wm. 3, sue out a second *ca. sa.*, though the *sheriff* could not retake on the first. *Buxton v. Home*, 1 Show. 174; *Scott v. Peacock*, 1 Salk. 271. And, on an escape against the will of the sheriff, either *he* or the *plaintiff* might retake. *Alanson v. Butler, Siderfin* (Eng.) 330. Thus it will be seen the law has never adopted a harsh and blind rule, which will not yield to diversities and exigencies as they arise. Indeed there are so many ways invented by which goods may be got from the sheriff, sometimes by fraudulent claims, sometimes by prior liens, and even by his own negligence, that it behooves the courts to look into the rule now urged upon us as working by a sort of magic to cut a man off

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his debt without the show or pretence of satisfaction. It is enough on plaintiffs who are without fault, to require that they should get their executions [*502] returned, without their being held satisfied, because in the mean time the sheriff has relinquished goods levied on. Doing so the debtor takes them to himself. In the case at bar, Burke had his colts again. Sometimes goods are so covered up by previous liens that it does not stand good to sell them, for none will buy. And shall the party, in such a case, be driven to an attempt which must be idle? Why may he not have his execution returned and resort to his creditor's aid? Indeed, we have been obliged to hold that he may. *Evans v. Irker*, 20 Wend. 622. Who will say that if the plaintiff happens to commit a mistake, and relinquish a levy upon a *modicum*, he must therefore lose his debt? If he have fairly and in good faith closed his proceeding on execution, why not give him his proper remedy?

But was not the levy in question void by reason of Steven's non-age? It appears that the town had elected him to the office of constable; and the justice had placed the execution in his hands. The plaintiffs then directed him to go on and collect the money as might be. He levied; but becoming satisfied that he had already committed a trespass, he was too prudent to go any farther; he returned the process to the justice, and gave up the money to the defendant. The latter offered to pay him the money, but he would not take it. Now it is said he was an officer *de facto*; and that his acts bound the defendant and plaintiff. He indeed had been an officer *de facto* (*People, ex rel. Dobbs v. Dean*, 3 Wend. 438); and had he gone on and collected the money, the defendant never disturbing him, nor the creditors interfering with his possession of it, the thing would have been well enough. But his acts were valid only in respect to such third persons as were affected by them. Viner's Abr. tit. Officer, G. 3, Id. G. 4, 16, p. 113, Lond. ed. 8vo. 1793. I know the cases have gone that way. But they have stopped with preventing mischief to the public, as confide in officers who are acting without right. *People, ex rel. Bush v. Collins*, 7 Johns. R. 549. The officer himself cannot be protected, except in some such case as *Wood v. Peake*, 8 S. 69. There he was appointed by the judicial act of magistrates having jurisdiction [*503] in cases of vacancies happening, and it was held that the officer's power could not be implied collaterally by showing that a vacancy had not happened. * * * [*504]

The result is plain. Stevenson was a trespasser. And, after the plaintiffs in the execution had been informed that he was an infant, they, by urging him on, would have brought themselves to participate in his peril. Then, taking the rule of satisfaction by levy in all its general strictness, as contended for by the defendant's counsel, what were the constable and plaintiffs to do? Most obviously, they stood within an exception to the rule. Had the money been collected by a sale of the colts, Burke might have recovered their value in trespass or trover; and in this might, most probably, have joined the plaintiffs, if he could show notice to them of their constable's disability. Such a circuitry would clearly have nullified the credit, and brought down a new execution on the defendant. The upshot is, that this young man prudently chose to do beforehand what the law would have forced him to do in another form; and, however stringent the rule of satisfaction by levy, this case made a plain exception. Suppose the sheriff to make an irregular arrest even on a *ca. sa.*; is the plaintiff to be cut off from his debt because the officer lets the man go? Goods of a third person are levied on and discharged; no one would pretend that this discharges the debt. There can be no doubt that in such and the like cases the creditor may relinquish the arrest, or levy, without prejudice.

It follows that the second execution in the case at bar was regular. The sale of the wheat on the ground, under that execution, was not impeached. Evidence was given of a disproportion in value between the wheat as it turned out and the sum due on the execution. Admit this, and that the plaintiffs directed the constable to sell it in preference to other property; Burke should have paid the debt. The sacrifice, if it be one, seems to have been of his own seeking. He sought to avail himself of a supposed technical advantage, derivable from the levy on the colts.

The verdict should, therefore, be set aside; at least so modified as to find the property of the wheat in the plaintiffs. * * *

New trial granted.

Judge Cowen's masterly argument in this case has been cited with approval by almost every court in America. If it did not establish a new rule, it caused the old one laid down in *Mountney v. Andrews* to be better understood. The supreme court of Arkansas (*Whiting v. Beebe*, 12 Ark. 538), in speaking of this subject said: "The rule laid down in *Clerk v. Withers*, was recognized by most of the American courts for a long while. Thus in New York, Kent, C.J., in *Denton v. Livingston*, as early as 1812 recognized and approved the decision in that case, after which for 27 years, in a series of uniform decisions, it was adhered to, until, in *Green v. Burke*, Cowen, J., for the first time in that state, ques-

owned the propriety of the rule in its unqualified sense, after which Bronson, C.J., in *People v. Hopson*, 1 Denio, 574, distinctly announced a change in the rule, which has since been generally acquiesced in by most, indeed by all the courts of the United States, so far as we are advised." In that case, Bronson, C.J., said, "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy on sufficient personal property, without more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody the remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor." For further discussion of the question see *Farmers & Mechanics' Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Kershaw v. Merchants' Bank*, How. (Miss.) 386; *Fry v. Manlove*, 60 Tenn. (1 Baxter) 256; *Reynolds v. Rogers*, 5 Ohio 174.

ABANDONMENT OF LEVY.—It has been held that a sale under *fi. fa.* was not void by reason of a levy under a prior *fi. fa.* in the same suit on other property, which was released with the creditor's consent, and the writ returned without anything further being done with it. *Wright v. Young*, 6 Ore. 87. Without proof of release of the first levy the purchaser under the second writ was held to have no title, the right of the creditor to abandon the levy and have a second writ, on returning the first, being assumed. *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978.

The supreme court of Pennsylvania refused to set aside a testatum *fi. fa.* issued after return of a *fi. fa.* showing levy and release. The court says: "The hogs were levied on by the sheriff, and were released, for that cause does not, nor is it necessary to appear, by the plaintiff's attorney, with directions, that the writ should not be executed." *Duncan v. Harris*, 17 Serg. & R. 436.

Yet the rule as generally stated is that if the creditor order a release without the consent of the debtor his claim is discharged, and he has no further remedy. Certainly the creditor would not be permitted to harass the debtor by seizing and releasing one thing after another. *Smith v. Hughes*, 24 Ill. 270; *Hunt v. Breeding*, 12 S. & R. (Pa.) 37, 4 Am. Dec. 665.

The right of the creditor to have a new writ upon return of the first, on which a levy has been made and nothing further done, must be conceded, provided the return shows, or it is otherwise proven, that any of the following facts exist:

1. That the first writ or levy was void, as in *Green v. Burke*; or, 2, that defendant had no leviable interest in the property, either because it was exempt from process or because it belonged to a stranger; for neither the plaintiff nor the officer is bound to persist in a mistaken course, but only have the burden to prove the fact (*Dixon v. White Sewing M. Co.*, 128 Pa. St. 397; *Bliven v. Bleakley*, 23 How. Prac. N. Y. 124); or 3, that defendant had rescued the property, or the officer had allowed it to escape or had abandoned it without plaintiff's consent, no loss thereby accruing to defendant (cases cited in *Green v. Burke*; also, *Littlefield v. Ball*, 103 Mich. 17; *Howard v. Bennett*, 72 Ill. 297); or, 4, that the plaintiff had ordered the release at defendant's request or with his consent (*Walker v. Commonwealth*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631); or, 5, that other creditors had obtained the property or its proceeds (*Bank*

of *Pennsylvania v. Winger*, 1 Rawle (Pa.) 295, 18 Am. Dec. 633; or, probably, 6, that the property had been destroyed by overwhelming calamity (compare *Brice v. Carr*, ante, . . ., but see cases cited in above opinion); and probably in many other cases.

Who May Have and Control Writ.

STEELE v. THOMPSON, ADM'R., in Ala. Sup. Ct., 1878—62 Ala. 323.

Action by Elijah S. Thompson, admr., against John D. Steele and others. From judgment for the plaintiff defendants appeal. This is an action against Steele and the sureties on his official bond, as clerk of the circuit court for Greene county, for his refusal to issue an alias execution.

BRICKELL, C. J. * * * The first question is, whether it is the duty of the clerk of a court in which a judgment has been rendered to issue execution thereon, at the verbal request of an attorney of the assignee of the judgment, the assignment not appearing of record in the court, and no written evidence of it being shown him, nor the attorney having entered himself of record, as an attorney for the plaintiff in the judgment. Judgments, as well as choses in action, are assignable. The assignment may not clothe the assignee with the legal title, but if it is unqualified, it passes the entire equitable interest, and is an irrevocable authority to employ the name of the assignor in enforcing it, and collecting and receiving the money due thereon. The court in which the judgment was rendered will protect the rights of the assignee, and will prevent the assignor from interfering with his contract over it. No payment made to the assignor after notice of the assignment is valid, and by no release or admission can he impair the equity of the assignee.—*Holland v. Dale*, Minor (Ala.), 265; *Gayle v. Benson*, 3 Ala. 234; 2 Brick. Dig. 153, § 312; *Freeman on Executions*, § 21. The assignment may be by writing, or by parol, and either, when founded on a sufficient consideration, passes the same rights, and confers the same authority. No entry of it on the records of the court is essential to its validity and operation, nor is there any statute, or rule of the common law, requiring that such entry shall be made.

An execution in civil actions, is the process by which the debt, or damages, or other things recorded, and the costs adjudged, are obtained. The clerk of the court is charged with the duty of

issuing the original, within a certain number of days after the adjournment of the court. If satisfaction is not obtained by the original, the party interested has the right to an *alias*, and a *pluries*, until satisfaction is obtained. These writs it is the duty of the clerk to issue on application; and his failure is a breach of his official bond, which binds him to the performance of all the duties required of him by law. The application may be oral or written. If the clerk deems it necessary for his protection, he may require that it be reduced to writing. But if it is oral, and [*328] he makes no objection on that ground when it is made, he cannot subsequently excuse his failure to comply with it, on the ground that it was not in writing. If he had objected, the cause of objection would have been easily removed; but not then objecting, and tacitly accepting the application as sufficient, it would be gross injustice to suffer him to excuse his failure from which injury has resulted, because of the manner of the application. So, if the application is made by a party having the real interest in the judgment, entitled to control it, though his interest and authority may not appear of record, he may demand some evidence of the interest or authority, if he doubts it. But if he makes no such demand—if by his silence he recognizes the interest and authority, it would approach a fraud, if he was heard subsequently to say in excuse for his failure to issue the writ, when injury had resulted, that no evidence of the interest or authority was shown him. As assignee of the judgment against Kirksey, the appellee had full authority over it. It was his right to demand execution thereon in the name of the plaintiff, and it was the duty of the clerk to comply with the demand when it was made. There is no particular form required, in which the demand should be communicated to the clerk, and if there had been, the form could have been waived by the clerk, and it was waived when he did not object to the form in which it was made. The assignee may control the judgment through an attorney, or an agent, and the demand or instructions of the attorney or agent, are of the same force as if they had proceeded from him personally.

It is enough to say in reference to the remaining question, there was no evidence the judgment was satisfied before the demand of the issue of execution. On the contrary, the evidence seems to us, undisputable, that it was unpaid, and the just inference is, the clerk knew the fact.

Let the judgment be affirmed.

That an assignee may have execution in the name of judgment creditor, but cannot have execution in his own name, see: *Reid v. Ross*, 15 Ind. 265; *Fiske v. Lamoreaux*, 48 Mo. 523—*Owens v. Clark*, 78 Tex. 547. Intimated that clerk should indorse on the execution, that it is for benefit of assignee, *Reid v. Ross*, *supra*; *Gardner v. Mobile & N. W. Ry. Co.*, 102 Ala. 635, 15 So. 471, 48 Am. St. Rep. 84; but see *Owens v. Clark*, *supra*. That the purchaser may have execution without first bringing a *scire facias*, see *Corriell v. Doolittle*, 2 G. Greene (Iowa) 385.

In Louisiana it has been held that one purchasing a judgment on execution could not have execution on it, but only had a right to sue the judgment debtor. *Fluker v. Turner*, 5 Martin, N. S. (La.) 707.

As a general rule, assignees of demands may make use of any remedy to collect them that would be available to the assignor, including attachment and garnishment. *Fuller v. Smith*, 58 N. C. (5 Jones Eq.) 192; *Crippen v. Fletcher*, 56 Mich. 388, 23 N. W. 56; *White v. Simpson*, 107 Ala. 386, 18 South 151.

Held that assignee of a claim could not attach on the ground that the obligation was fraudulently contracted, for that is a personal matter between the original parties. *Cheshire Provident Inst. v. Johnston*, Fed. Cas. No. 2659.

MORGAN v. PEOPLE, in Ill. Sup. Ct., June Term, 1871—59 Ill. 58.

Debt by the People of the State of Illinois for the use of Thomas Lewis against Joel G. Morgan et al. on the official bond of Morgan as sheriff of Alexander county. The defendant pleaded: 1, *non est factum*; 2, that the sale was not ordered suspended; 3, that he sold the property according to law by virtue of an execution against Lewis; 4, that the attorney for the judgment creditor directed him to sell. A demurrer to the third and fourth pleas was sustained, and judgment found for the plaintiff on issue and trial on the other pleas. Defendant brings error.

THORNTON, J. * * * [*60] The declaration avers that the sheriff had an execution in favor of Boyer against Lewis, by virtue of which he levied upon certain shares of stock, and advertised a sale on the 29th of October, 1867; that the defendant in the execution paid off and satisfied the same on the 28th of October, except the costs, and that prior to the sale, the plaintiff in the execution ordered a suspension thereof, and that the sheriff refused to suspend, and sold stock of the value of \$5,000. * * *

An officer might proceed strictly in accordance with the law governing the conduct of an execution in his hands, and yet be guilty of the breach assigned. He may have an execution in due form: levy it upon property liable to seizure; make proper advertisement of a sale, and fully comply with the formal requirements

of the law; yet, if he should sell in utter disregard of the instructions of the plaintiff, he incurs a liability to the defendant in the execution. The third plea does not then traverse the material portion of the breach. The fourth is no better than the third plea. The breach is, that the plaintiff suspended the sale; the plea is, that the attorney directed it; but *non constat* that he may not have violated the orders of the plaintiff. The execution is the process of the plaintiff, and he has a right to control it without any interference on the part of attorney or officer. *Reddick v. Admrs. of Cloud*, 7 Ill. (2 Gil.) 670. The demurrer was rightly sustained. * * *

Judgment affirmed.

That officers of court, or witnesses to whom fees are due, have not the power to order execution on a judgment owned by another, see *Ex Parte Hampton*, 2 G. Greene, (Iowa) 137.

What Court May Issue Writ.

CLARKE v. MILLER, in New York Sup. Ct., July 11, 1854—18 Barbour Sup. 269.

In the sixth judicial circuit at the Delaware general term; Crippen, Shankland and Mason, JJ.

Ejectment by Miller against Clarke. From judgment for plaintiff at a special term defendant appeals.

MASON, J. This is an action of ejectment, and the plaintiff made his title through a judgment, execution and sheriff's deed. The judgment was recovered on the 7th day of May, 1846, in the court of common pleas of Tompkins county, in favor of the Tompkins County Bank, against Andrew W. Knapp and Birdsey Clarke, for \$116.23. In July, 1849, an execution was issued out of the supreme court, upon said judgment, to the sheriff of Tompkins, who sold the premises thereon; and the fifteen months having expired, the sheriff, on the 1st day of January, 1851, gave to the purchaser a deed, which recited that the execution issued out of the supreme court. After the commencement of the present action, the county court [*270] of Tompkins granted an order amending the execution, the sheriff's certificate of sale, and the sheriff's deed, so as to make the execution issue out of the county court of Tompkins, instead of the supreme court; and the sheriff, after his term of office had expired, in pursuance of said order, erased the words, supreme court, and inserted Tompkins county

court, in the reciting part of said deed, and after the deed had been delivered, and without any new acknowledgment thereof. These facts all appeared before the execution and sheriff's deed were offered in evidence; and when offered, the defendant's counsel objected to the execution and sheriff's deed, in consequence of such alterations. The judge at the circuit overruled the objection and admitted them in evidence, and held the title acquired by the purchaser under them to be good.

The judge at the circuit most clearly erred. A sheriff's sale of land is within the statute of frauds, and requires a deed, to pass the title to the purchaser. *Jackson v. Catlin*, 2 John. 248. And a sheriff's deed is not admissible in evidence, without showing the judgment and execution under which he sold. *Bowen v. Bell*, 20 John. 338. The sheriff's deed not being admissible, without producing the judgment and execution, I do not see upon what principle it could be admitted at all. The rule is a familiar one, that judgments must be executed in those courts in which they are rendered. 3 Bacon's Abr. 715, tit. Execution, E. I do not see upon what principle the supreme court could assume to execute this judgment, recovered in the common pleas. The supreme court possessed no power to award a *fiery facias* upon that judgment, and every execution that is issued by the attorney is regarded in law as awarded by the court out of which it issues, just as much as if the award was made upon the record. It strikes me as a strange proceeding, for the supreme court to award an execution to the sheriff, commanding him to collect a judgment of the county court; and I entertain no doubt but such an execution is absolutely void. But what is more strange still, after the sheriff has executed it and sold the lands of the defendant and given a deed to the purchaser, the county court assume to say: "We will interfere with [*271] the process of the supreme court, because that court has undertaken to execute our judgment;" and so, by an order, the county court change, I suppose, an execution of the supreme court which has been fully executed and returned, into a process of the county court, and declare, in effect, that the child is theirs, although they had no hand in begetting it. The rule is a familiar one, that every court can amend its own process. It is said to be a power incidental to every court. It is no more than assuming the power to correct its own proceedings; but I am not aware of any power in the county court to amend the process of the supreme court. This process, being void, is not amendable. *Bunn v. Thomas*, 2 John.

190; *Burk v. Barnard*, 4 Id. 309; *Müller v. Gregory*, 4 Cowen, 504; *Chandler v. Becknell*, Id. 49. In *Simon v. Gurney*, (1 Marsh. 237, 5 Taunton, 605, 1 Petersdorf's Abr. 595), where a *fiery facias* was issued upon a judgment in the common pleas, returnable in the king's bench, but the writ was tested in the name of the chief justice of the common pleas, the court allowed the writ to be amended, by making it returnable in the common pleas placing their decision upon the express ground that, as the writ was tested in the name of the chief justice of the common pleas, there was something to amend by. The reason why void process cannot be amended is, there is nothing to amend by. All the cases hold the very sensible language, that, when there is nothing to amend by, the court have no power of amendment. In this case, the writ issuing out of the supreme court, and returnable in that court, there is nothing in the county court to amend by. The county court could not amend anything that has been done in that court towards the execution of their judgment, for nothing has been done in that court. The execution being void in the hands of the sheriff, all that was done under it is of no effect. As a consequence, the sheriff's certificate is a mere nullity, and so was his deed. * * * [*272] * * * I am of opinion that, for these reasons, without considering the other questions in the case, the judgment of the circuit court should be reversed and a new trial granted; costs to abide the event.

Reversed.

RAHM v. SOPER, in Kan. Sup. Ct., July Term, 1882—28 Kan. 529.

Action commenced in justice court by Frank Rahm against R. B. Soper, his tenant, to recover rent. Soper defends on the ground that, after the rent accrued and before plaintiff purchased. Soper was summoned as garnishee of plaintiff's grantor, Eliz. H. Hook, on a judgment against her in favor of T. J. Stout. From judgment for defendant by the district court on appeal, plaintiff brings error.

HORTON, C.J. The judgment of T. J. Stout against Elizabeth H. Hook was rendered before a justice of the peace of Leavenworth county in 1878, and in the same year an abstract of that judgment was docketed in the district court of Leavenworth county, under § 119 of the justices' act. The garnishment proceedings against R. B. Soper were commenced on March 21, 1881, before the justice rendering the judgment, and long subse-

quent to the docketing of the abstract in the district court. It was held in *Treptow v. Buse*, 10 Kas. 170, that the filing of an abstract in the district court has the same force as the filing of the transcript of a judgment. Comp. Laws of 1879, ch. 81, § 119; id., ch. 80, § 518. The filing of an abstract of a judgment rendered before a justice of the peace obviously contemplates a transfer of the judgment from the justice's court; and after the judgment is so transferred to the district court, it becomes subject to the same rules and vested with the same powers as though originally rendered in that court. *Treptow v. Buse*, *supra*; Comp. Laws, 1879, ch. 81, § 188. [*531]

Section 138 of the justices' act reads: "It shall be the duty of the justice, if the case be not appealed, taken up on error, docketed in the district court, or bail has not been given for the stay of execution, at the expiration of ten days from the entry of the judgment, to issue execution without a demand and proceed to collect the judgment, unless otherwise directed by the judgment creditor."

Within the express terms of this section, after a case has been docketed in the district court, it no longer becomes the duty of the justice to issue execution in the absence of a demand. As the docketing of the judgment in the district court transfers the judgment to that court, and as by such transfer it becomes subject to the same rules and vested with the same powers as though originally rendered in that court, the judgment creditor after such transfer must look to that court for the means of enforcing the collection of the judgment, and cannot demand execution under § 137 of the justices' act. This certainly was the intention of the legislature, and this construction of the statute renders the provisions of the code and the sections of the justices' act concerning this subject-matter harmonious. If a different view were entertained, a plaintiff would have the privilege of process on the same judgment from two courts within the same county at the same time. If the judgment creditor is not deprived of the right to an execution before the justice after he has transferred his judgment to the district court by filing an abstract, the provisions relating to revivor in § 522 of the code are without much significance, as the plaintiff might keep alive his judgment before the justice and from time to time file new abstracts. As in our view the justice after the filing of the abstract of the judgment in the district court had not jurisdiction to issue process in the case, all of the garnishment proceedings after the transfer of

the judgment to the district court must be regarded as nullities.

* * * [*532] * * *

The judgment of the district court must be reversed, and the case remanded with direction to the court below to enter judgment upon the agreed statement of facts for plaintiff in error.

Reversed.

Same effect: *Herdman v. Cann*, 2 Houston (Del.) 41—*Oberwarth v. McLean*, 52 How. Pr. (N.Y.) 491. Compare *Baker v. King*, 2 Gr. (Pa.) 254; *Brandt's App.* 16 Pa. St. 343; *Nelson v. Guffey*, 131 Pa. St. 273, 289.

The Form and Essentials of the Writ, Etc.

BURNHAM v. DOOLITTLE, in Neb. Sup. Ct., Feb. 8, 1883—14 Neb. 214, 15 N. W. 606.

LAKE, C. J. This petition in error presents two questions. *First.* Was the motion to quash the summons in garnishment properly overruled? *Second.* Was the plaintiff in error rightly held as garnishee? [*215] * * *

The objection to the summons was simply that the "affidavit on which the procedure is based is insufficient in not establishing that the garnishee has property of, or is indebted to defendant; and that" * * * "it is not entitled in any court, proceeding, or cause."

This objection is based in part upon the supposition that, to properly institute a proceeding of this kind, the affidavit must necessarily show that the person to be summoned has property of the judgment debtor in his possession or under his control, or is indebted to him, and that a statement of *mere belief*, without more, will not answer. Referring to the statute, however, we find that nothing further is required to be stated than that the judgment creditor "has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor." Upon the filing of an affidavit, stating such belief, it is provided that the proper officer "shall issue a summons as in other cases, requiring such person or corporation to appear in court and answer such interrogatories as shall be propounded to him, it, or them, touching the goods, chattels, rights, and credits of the said judgment debtor in his, its, or their possession, or [*216] control." Sec. 244, Comp. Statutes, 562. Mere belief, therefore, is all that the statute contemplates, and

consequently all that courts have the right to exact in affidavits of this kind. If it had been intended that the facts and circumstances inducing such belief should be given, and their sufficiency determined by the court, it is but reasonable to suppose that language altogether different from this would have been employed.

The other point of this objection, viz., that the body of the affidavit was without a title, is merely technical. In the affidavit it is clearly averred that it was a transcript of the record of the writ of Doolittle & Gordon v. W. Sanford Gee, that had been filed in the district court, and it was against "the property of the said W. Sanford Gee" that the garnishment proceeding was directed. Besides, the affidavit was endorsed, "Doolittle & Gordon against W. Sanford Gee," and this is also the endorsement of the summons served upon the person garnished. There could not have been, therefore, any possible doubt as to the case in which it was intended to use the affidavit, nor as to the persons sought to have been affected by it. There was neither uncertainty nor ambiguity in any particular, and we are aware of no purpose that would have been better served by prefixing the title of the cause to the body of the affidavit.

The only remaining question is whether the judgment debtor's equity of redemption, or interest in the two promissory notes, could be reached and held by the process of garnishment? It must be conceded that according to most of the cases bearing upon this question, it could not. 1 Wait's Actions and Defenses, 422, 423. Following this general current of authorities, we held in *Peckinbaugh v. Quillin*, 12 Neb. 586, that it is only when a mortgagor of goods has the right of possession for a definite period that he has an attachable interest in them. This rule did not influence the result of that case, however, for the reason that the property was insufficient to satisfy the mortgage [*217] debt. But in view of our attachment law, and the ruling of the supreme court of Ohio on a statute from which ours was copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them, in this state, may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee. And to this extent our opinion in the case of *Peckinbaugh v. Quillin* must be modified. In the case of *Carty v. Fenstermaker*, 14 Ohio State 457, which arose under a statute just like our own respecting this matter, it was distinctly held that the interest of

a mortgagor of chattel property in possession of the mortgagor, after condition broken, was attachable. The seizure of the property under the order of attachment, it was said, "creates a lien in favor of the attaching creditor upon the interest of such mortgagor." * * * [*218] * * *

Judgment affirmed.

PARSONS v. SWETT, in N. Ham. Sup. Ct., Coos, Dec. Term, 1855—
32 N. H. 87, 64 Am. Dec. 352.

A plea in abatement of an original writ, for that it was tested in the name of a chief justice who had resigned, was held bad in form. Then a motion to quash the writ for the same cause was made. Denied.

PERLEY, C. J. The constitution of New Hampshire, article 87, provides that "all writs issuing out of the clerk's office in any of the courts of law, shall be in the name of the state of New Hampshire; shall be under the seal of the court whence they issue, and bear the *teste* of the chief, first, or senior justice of the court, and shall be signed by the clerk of said court."

Provisions of the constitution are to be interpreted by the same rules that are applied in the construction of similar provisions in statutes; and the party that would avail himself of any provision in the constitution must do it in the same manner and in the same time and order, that would be required in cases of like provisions in statutes. *Ripley v. Warren*, 19 Mass. (2 Pick.) 592; *Marston v. Brackett*, 9 N. H. 336, 349.

Before the revolution all writs in the province of New Hampshire were in the king's name; and probably when the change was first made, by substituting the name of the state for the regal style, one object was to avoid all appearance of recognizing the royal authority. If beyond this there is any design to give authenticity and credit to legal process, by requiring an actual attestation of the chief, first, or senior justice of the court, the practical construction which has uniformly been put on this provision of the constitution has wholly defeated that object; for the ordinary process of the court never in fact bears the actual signature of the chief justice, but his name is printed into the blank writs before they are delivered out of the clerk's office. The *teste* of the writ is therefore in practice a mere matter of form.

A writ which issues without the proper *teste* is not in terms

declared by the constitution to be void, and we think is not to [*89] be held so by construction. In the same article of the constitution writs are required to be signed by the clerk, but a writ is not void because it wants the signature of the clerk, and the objection will be overruled, if not seasonably made. *Lovell v. Sabin*, 15 N. H. 29, 37.

In Massachusetts, upon the construction of a similar provision in their constitution, it has been decided that the want of a proper *teste* is mere matter of form, and must be taken advantage of by seasonable objection—otherwise it will be held to have been waived. *Ripley v. Warren*, 19 Mass. (2 Pick.) 592.

In this case the want of a proper *teste* did not make the writ void. The plea in abatement was defective in form, and overruled. The motion to quash the writ was addressed to the discretion of the court, and that discretion was properly exercised by denying the motion. As a general rule, a motion to quash a writ for a cause which might be taken advantage of by plea in abatement, must be made within the time limited for filing pleas in abatement. *Trafton v. Rogers*, 13 Maine 315.

Our practice requires such pleas to be filed within the first four days of the first term, and the court of common pleas were well warranted in holding that the defendants had waived their right to insist on the objection, by neglecting to make the motion until the second term.

Even if the plea in abatement had been sufficient, or the motion to quash had been seasonably made, the writ might have been amended, for it was not void, and the court had jurisdiction; as we understand to have been held in *Reynolds v. Damrell*, decided in Hillsborough county, July, 1849, and not reported.

We have not overlooked the case of *Hutchins v. Edson*, 1 N. H. 139, in which it was held that a writ of execution, not under the seal of the court, was void. The general language used in that case might tend to the conclusion that writs of mesne, as well as final process, were void, unless under the seal of the court. It is obvious, however, that there is an important distinction between the two kinds of writs, because to a writ of final process the defendant has no opportunity to object, by plea or motion, that it wants a seal or other constitutional requisite; whereas in the case of mesne process he may plead the defect, or make it the ground of a motion; and it may perhaps be found, when a case shall arise which presents the question, that the doctrine of *Hutch-*

ins v. Edson ought not to be extended beyond the point expressly decided. *Foot v. Knowles*, 45 Mass. (4 Metc.) 386; *Brewer v. Sibley*, 54 Mass. (13 Metc.) 175; *People v. Drinning*, 1 Wendell 16; *Jackson v. Brown*, 4 Cowen 550.

SIDWELL v. SCHUMACHER, in Ill. Sup. Ct., June 21, 1881—99 Ill. 426.

Ejectment in Wayne circuit court. Plaintiff showed title through a judgment, special execution, and sheriff's deed thereon, received in evidence over defendant's objection. The execution did not run in the name of the people. Judgment for plaintiff. Defendant appeals.

MULKEY, J. * * * While there is some conflict of authority upon this subject, yet it is believed that the weight of authority establishes the proposition that, where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory, and a failure on the part of the official whose duty it is to issue it, to comply with the law in that respect, will render such process void. On the other hand, it is well settled that there are many merely formal defects which do not have that effect. To illustrate, where the statute or constitution expressly requires that process shall issue under the seal of the court, and be tested in the name of and signed by the clerk, the failure to comply with either of these requirements would, as it is believed, according to the weight of authority, render the process void. The legislature or the people, through the constitution, have the unquestionable right to say of what process shall consist, and when they have declared that it shall be of a specified form, by implication all other forms are prohibited. If such laws are merely directory, then writs are as valid without [*434] their observance as with it, and every clerk would be at liberty to issue process in whatever form might suit his fancy. If one of these requirements may be omitted, all may, on the same principle. Under such a system, one clerk might conclude that the ceremony of attaching a seal was idle and useless. Another might think the writ would be sufficient with the seal, and that the addition of the name of the clerk would therefore be superfluous. Another might think all these requirements of the law are but idle ceremonies, and for them substitute something altogether different.

Under such a system of things, how could the defendant in

the process know what was valid and binding upon him and what was not, and when to obey and when not? And how could the officer into whose hands it was delivered for execution know whether he would be protected in serving it or not? And what would become of the almost numberless questions discussed by the courts and legal authors, founded upon the supposed distinction between void and voidable process, if there are no essential requirements by which the one can be distinguished from the other?

It will, doubtless, be conceded that the constitutional requirement that all process "shall run in the name of the People," stands upon at least as high footing as the statutory provisions which require process to be issued under the seal of the court, and to be tested in the name of and signed by the clerk. That it is so regarded is expressly conceded in *Commissioners, etc. v. Barry*, 66 Ill. 496.

The decisions, therefore, with respect to the omission of a seal or other statutory requirement, will be directly in point upon the question involved in this case. * * * [*435] * * *

Bybee v. Ashby, 7 Ill. (2 Gilm.) 151, 43 Am. Dec. 47, like the present case, was an action of ejectment. The plaintiff, to show title in himself, relied upon a sale and sheriff's deed under a judgment rendered in Knox county circuit court, the land in controversy [*436] being situated in Fulton county. The execution under which the sale was made, by a mere clerical error was directed to the sheriff of Knox county, instead of Fulton county. * * * This court, in the course of its opinion, there said: * * * "Where the execution is not regular upon its face, as, for instance, it is issued without the proper seal of the court attached, or where, as in this case, it is directed to the sheriff of one county and delivered to the sheriff of another county to be executed, such process will not justify the officer in executing it, and all his acts under it will be absolutely void and he a trespasser, and the purchaser will acquire no right to the property purchased at the sale." * * * [*437]

Davis v. Ransom et al., 26 Ill. 100, was an action of replevin, for the recovery of certain chattels which were claimed under an execution sale. On the trial of the cause, the court below excluded as evidence the execution under which the sale was made, on the ground that it was not under seal, and on appeal to this court the ruling of the court below was sustained. * * *

In *Hernandez v. Drake*, 81 Ill. 34, where the validity of a

sale of real estate under an execution to which the clerk had inadvertently omitted to sign his name was under consideration, it was said: "The next question presented is, what [*438] was the effect of the execution issued without the signature of the clerk? * * * The signature is as essential under this law as is the seal or other specific requirement, and in its absence the writ must be held to confer no power upon the officer to whom it was directed."

Whatever the law may be with respect to the power of courts to allow amendments before judgments, where the parties have appeared in obedience to defective or even void process for the purpose of taking advantage thereof, of which we express no opinion, as it is not necessary to a decision of this case, the present review of the authorities clearly warrants the conclusion that a sale of land under an execution that does not run in the name of the People, that is not sealed, or is not signed by or directed to the proper officer, is absolutely void, and may be successfully resisted in any kind of a proceeding, or in any forum in which the question may arise. * * *

Judgment reversed.

LOWE v. MORRIS, in Ga. Sup. Ct., Feb. Term, 1853—13 Ga. 147.

Motion to dismiss a writ of error for want of a seal.

LUMPKIN, J. Is a writ of error a nullity without a seal?

My first impression was that this defect was fatal. Upon reflection, my final conclusion is the other way. * * *

His signet or seal was the pledge of *indentity* and fidelity, exacted by Tamar of Lord Judah, one of the twelve princes of Israel. Moses' Reports, Book Genesis, c. 38, v. 18. See also Esther, c. 8, v. 8 and 10. It would seem from this last case, that even at this early period monarchs as well as courts at this day, could only act through their official seal. And the reason given is, that the precept issued in the king's name and sealed with his ring, by his clerk, Mordecai the Jew, *may no man reverse*. And this is the strong position of my learned brother. (M. anciently, as now, I would remark, was a favorite *initial* for the name of court clerks, from *Mordecai* the Jew, even down to *Martin*, the *Gentile*.) Whatever else there may be that is new under the sun, it is very evident from this last authority, that *mails* are not. For we are told that these letters mandatory of Ahasuerus were sent by *post*, on horseback, and riders on mules, camels, and young dromedaries.

So much for the antiquity and importance of seals. It will be found, upon further investigation, that modern decisions adhere very strictly to these patriarchal precedents. * * * [*153]

The truth is, that this whole subject, like many others, is founded on the usage of the times, and of the country. A scroll is just as good as an impression on wax, wafer, or parchment, by metal, engraved with the arms of a prince, potentate, or private person. Both are now utterly worthless, and the only wonder is, that all technical distinctions growing out of the use of seals, such as the statute of limitations, plea to the consideration, etc., are not at once universally abolished. The only reason ever urged at this day why a seal should give better evidence and dignity to writing is, that it evidences greater deliberation, and therefore should impart greater solemnity to instruments. Practically we know that the art of printing has done away with this argument. * * *

So long as seals distinguished identity, there was propriety in preserving them. And as a striking illustration, see the signatures and seals to the death warrant of Charles I., as late as January, 1648. They are 49 in number, and no two of them alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S., imprisoned in its serpentine folds, as equipotent with [*154] the coats of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont, and Geoffry Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether.

In *Jones & Temple v. Logwood*, 1 Washington (Va.) 42, President Pendleton states, that there was a period when the impression was made with the eye-tooth, and thinks there was some utility in the custom, since the tooth's impression was the man's own, and presented a test in case of forgery. But this reason, however applicable in Virginia in 1791, does not hold true in this epoch of dentistry, when no man's tooth is his own, but teeth, like almost everything else, are artificial. * * *

What magic, I ask, is there in our own seal? True, the clerk has attested this writ of error in his official name, and by his private seal, and in obedience to it, the clerk of the circuit court has certified and transmitted to this court all the records and papers of file in the court below, which are necessary to enable us to hear and determine properly this cause, upon its merits. But then we look in vain on this writ for the three pillars sup-

porting an arch, with the word *constitution* engraven within the same, emblematic of the constitution, supported by the three departments of government: legislative, judicial, and executive. The first having engraven on its base, wisdom, the second, justice, and the third, moderation, and then on the right of the executive column, a man standing with a drawn sword, and resembling most strikingly [*155] in figure and attitude our most worthy and excellent chief magistrate. But I forbear.

Illi robur et aes triplex. He would be a bold judge indeed, who would venture to decide *an issue of law* in the absence of this *speaking* device! There is a charm in that arch—a spell in those pillars—an inspiration in the eye of that fierce-looking swordsman, which guarantees a faithful administration of justice, although simply and but very imperfectly impressed on the foolscap paper on which the writ of error is printed, instead of wax or some other tenacious substance.

To whom we are indebted for the change in our seal, I am not antiquarian enough to state. The old devices I always venerated; the one side the scroll on which was engraved *The Constitution of the State of Georgia* and the motto, *pro bono publico*. On the other side, an elegant house and other buildings, fields of corn, and meadows covered with sheep and cattle; a river running through the same, with a ship under full sail and the motto, *Deus nobis hæc otia fecit*. The Latinity as well as the piety of this seal, commend themselves to my hearty admiration. They will challenge a comparison, even on the score of architectural taste too, with the *arch* resting on *three pillars*. But then the capital defect in the old seal—who does not anticipate me?—was the absence of that *cocked-hat swordsman*. Without this *addendum*, it is difficult to decide that any public document can impart absolute verity. This it is, I am sure, that has exerted such a controlling influence over the judgment of my dissenting brother, with his well-known military propensities.

The act of 1845 authorizes this court to establish and procure a seal. My recollection does not serve me whether the state coat of arms was selected as the device. I take it for granted it was. If so, where, upon any seal attached to any writ of error or citation returnable to this court, are those three potent and cabalistic words: wisdom, justice, and moderation? Do not these constitute a part of the seal just as much as the seal does a part of the writ of error? Is it the seal of this court without them? If so, how much, and [*156] what portions of it may be

omitted and still leave a good seal? Would it be a seal without the arch, without the pillars, without the motto? I forbear even to put the question whether it would be a seal without the *military effigy*—without that *cocked-hat swordsman*? Of course it would be a nullity. As well talk of a *man* without a *body*!

For myself, I am free to confess that I despise all forms having no sense or substance in them. And I can scarcely suppress a smile, I will not say “grimace irresistible,” when I see so much importance attached to such trifles. I would cast away at once and forever, all law not founded in some reason—natural, moral, or political. I scorn to be a “*cerf adscript*” to things obsolete, or thoroughly deserving to be so. And for the “gladsome *lights* of jurisprudence” I would sooner far, go to the reports of Hartly (Texas), and of Pike and English (Arkansas), than cross an ocean, three thousand miles in width, and then travel up the stream of time for three or four centuries, to the ponderous tome of Siderfin and Keble, Finch and Popham, to search for legal wisdom. The world is changed; our own situation greatly changed; and that court and that country is behind the age that stands still while all around is in motion.

I would as soon go back to the age of monkery—to the good *old* times when the sanguinary *Mary* lighted up the fires of Smithfield, to learn true religion; or to Henry VIII., the British Blue-Beard, or to his successors, Elizabeth, the two James’s and two Charles’s, the good *old* era of butchery and blood, whose emblems were the pillory, the gibbet and the axe, to study constitutional liberty, as to search the records of black-letter for rules to regulate the formularies to be observed by courts at this day.

I admit that many *old* things may be *good* things—as old wine, old wives, ay, and an old world too. But the world is older, and consequently wiser now than it ever was before. Our English ancestors lived comparatively in the adolescence, if not the infancy of the world. It is true that Coke, and Hale, and Holt caught a glimpse of the latter-day glory, but [*157] died without the sight. The best and wisest men of their generation were unable to rise above the ignorance and superstition which pressed like a nightmare upon the intellect of nations. And yet we, who are “making lightning run messages, chemistry polish boots and steam deliver parcels and packages,” are forever going back to the good *old* days of witchcraft and astrology, to discover precedents for regulating the proceedings of courts, for upholding seals and all the tremendous doctrines consequent upon

the distinction between sealed and unsealed papers, when *seals de facto* no longer exist! Let the judicial and legislative axe be laid to the root of the tree; cut it down. Why cumbereth it, any longer, *courts and contracts*?

Having treated this subject scripturally and historically, though very discursively, I propose to add a word or two upon the physiological aspect of the question. And I repeat the interrogatory propounded at the beginning of this opinion, namely: What defect will make a writ of error void? And I answer the query by proposing another: What defect, original or supervenient, will reduce man from the genus *homo*?

Will the amputation of the feet and legs disfranchise a descendant of Adam of his title to manhood! It will not be denied but that he may lose every limb of the body and leave nothing but the naked trunk, and yet be a *man* "for a' that." And is the seal, though it be constituted of the arch, and pillars, and swordsmen, more essential to the writ of error, or a pedestal to support it, than legs and feet and arms are to manhood? Common sense will decide. * * *

Motion denied.

WARREN, J., delivered an opinion agreeing with LUMPKIN, J., and NESBIT, J., filed a dissenting opinion.

GORDON v. CAMP, in Pa. Sup. Ct., July 18, 1846—3 Pa. S. (3 Barr) 349, 45 Am. Dec. 647.

Replevin in Bradford common pleas by Sill Camp against Gordon. At the trial Camp showed title in himself and rested. Defendant offered in evidence a judgment of a justice of the peace against Camp and another, execution thereon to the constable of Herrick township, and a return thereon by the constable of Standing-Stone township, showing a levy and sale of the property to the defendant. This evidence was rejected and judgment given for the plaintiff.

BURNSIDE, J. * * * [*350] It has been held that a warrant directed by the justice to constable, if it is executed by the *proper constable of the district*, is well directed. The reason given is, that the word constable, with a *blank*, cannot be said to be directed to the wrong constable, and may be understood as directed for the right one. It is better to direct it to the constable by name, or to the constable of the district generally. *Paul v. Vankirk*, 6 Binn. (Pa.) 125.

A justice issued an execution directed to the constable of B. district, four miles from the township of A., where the defendant resided, a township lying between them; it was held, that as the act was directory, the justice was to determine the next constable most convenient to the defendant, and that the execution was for that reason not void. *Smith v. Schell*, 13 Serg. & Rawle, 336.

No case has been decided, that an execution directed to the constable of a particular township, can be handed over by him to the constable of another township, to whom it was not directed, and that the latter could legally execute it.

Here the execution was directed to the constable of "Herrick," who gave it to the constable of "Standing-Stone." Every act done by the constable of Standing-Stone was illegal. His sale was as if no execution had issued. His acts were utterly void; and he was a trespasser. It is contended we should sanction this practice, because it prevails, and is convenient in Bradford county. If so, the sooner an end is put to the practice, the better. There is no law to authorize it; and all trading between constables leads to corruption and injustice, and should be discouraged. [*351]

It does not appear that any money was paid, and the constable returned, not that he had received the money, but *that he had sold for \$39.75. Sale indemnified by James Gordon*, 11th March, (the sale was on the 10th,) the above property replevied. Signed H. S. Stephens, constable of Standing-Stone.

The rejection of this return of sale is the only error complained of. In so doing, the court was clearly right.

The judgment is affirmed.

Cooley, J. "The case of the officer is next to be considered. It is claimed, first, that he is liable [in trespass by the judgment debtor for the wrongful levy after defendant had appealed from the judgment on which the execution was issued] because the process was not addressed to him, and therefore he had no authority to serve it. But the statute expressly empowers sheriffs to serve the process which constables may execute (Comp. Laws, 1871, §568); and it does not require that there should be any special direction for the purpose. * * * No error was therefore committed in holding the officer not liable." *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.

An execution issued by a justice of the peace is not liable to collateral attack because addressed "To any lawful officer," if this be a defect. *Johnson v. Whitefield*, 124 Ala. 508, 27 South 406, 82 Am. St. Rep. 186.

EXECUTION OF THE WRITS

The Court's Power to Control.

COMMONWEALTH v. MAGEE, in Pa. Sup. Ct., June 9, 1848—8 Pa. St. 240.

Debt on official bond by the commonwealth for the use of L. G. Brandebury and G. Klink against Alexander Magee, late sheriff of Perry county, and his sureties, to recover the amount of a *fi. fa.* given him for collection. From judgment for defendants plaintiff brings error.

The *fi. fa.* in question was issued and given to the sheriff April 9, 1844, returnable at the August term. At the time the writ was given to the sheriff, the defendant had plenty of property liable; but the sheriff had taken no action under the writ when the judge at chambers made an order in the cause, "May 4th, 1844, in the above case proceedings stayed until the 2nd day of the August Term ensuing this date. John Judkin." Aug. 7th, 1844, a *fi. fa.* was issued on a judgment of John Conrad against the common debtor and on this *fi. fa.* all of the debtor's property was sold.

Brandebury, for plaintiff, contended, (1) that the order was *coram non judice*, and no protection to the sheriff, (2) at all events the sheriff became liable by his failure to make return and by concealing the order till he had sold the defendant's property on junior executions.

BELL, J. It is true a sheriff must use due diligence and make the money demanded by an execution placed in his hands. What will amount to due diligence must necessarily vary with the circumstances of each case; but it may be safely affirmed that when there are no peculiar reasons known to the sheriff calling for the exertion of unusual energy, and no special request by the plaintiff or his agent for immediate action, a delay such as occurred here before the delivery of the judge's order of the 4th of May, in the absence of collusion or fraud, will not be deemed *laches* to fix the officer for loss of the debt. Indeed, no fact is suggested on the record tending to show that the lapse of time

that intervened between the delivery of the writ and the making of the order, endangered the plaintiff's demand. The execution which eventually swept the goods of the defendant, Ernst, was not issued until long after, and its success was consequent, not on the delay of the sheriff, but incidentally upon the legal effect of the judge's interference.

The inquiry is thus reduced to the single question, whether his order to stay proceedings was obligatory on the sheriff, or a nullity, commanding neither respect nor obedience.

The authority that a judge exercises at chambers in a cause pending, is the authority of the court itself. *Doe dem. Prescott v. Roe*, 9 Bing. (Eng.) 104, 2 Moore & S. 119, 1 Dowl. P. C. 274. And it may be enforced by attachment issued by the court, for the reason that disobedience of a judge's order is a contempt of the court, and punishable as such.

It is said, that, upon any other principle than that of delegated authority, it would be difficult to demonstrate the validity of many of the acts done by judges in cases and under circumstances in which the legislature has not specially invested them with power, in their individual capacities. This species of jurisdiction is exercised *ex necessitate rei* to prevent injustice and oppression, and to facilitate and direct the interlocutory proceedings of suits at law. It consequently embraces a variety of subjects more or less important to a proper administration of justice. Some of them are of course; and the administration of others calls for the exertion of a sound judgment and discretion. It is properly, therefore, under the control of the court from which the authority is derived, and to which a dissatisfied party is at liberty to appeal. Among the subjects which reasonably fall within the circle of this jurisdiction, the power of staying an execution issued in vacation has been repeatedly recognized and acted on. Such an authority to be exercised by a single judge, is [*247] indeed necessary to prevent oppression, and to prohibit the undue sacrifice of property illegally levied. For these purposes it should be liberally, though cautiously, exercised. There can exist, therefore, no doubt that a judge of the court of common pleas possesses authority to make such an order as is complained of here, and, when properly made, that it is obligatory on the officer to whom it is addressed. But while this is conceded, it is insisted that the order under consideration was *coram non iudice*, and void for want of previous notice to the plaintiffs in the execution. It is very true that the proper mode of proceeding in most cases is by summons,

in the nature of a rule *nisi*, fixing a day for a hearing, and served on the opposite party. Without this the judge ought not to interfere, unless, indeed, the order or direction sought is of course. When the order is made, notice of it should be given to the party to be affected by it; otherwise he is at liberty to disregard it. Bagly's Prac. 15 et seq. But notice is not always necessary, for in some cases an order may be without summons. Nor is the omission of it fatal to the validity of the proceeding, *ab initio*, in any case. Though it is highly proper, and indeed indispensable, to correct practice, a neglect to give it is but an irregularity which, upon application would furnish a sufficient ground to rescind the order made, but would not justify the officer's refusal to obey it. The power of acting residing in the judge, it is no part of the sheriff's business to inquire whether it has been executed in an orderly manner, or to determine how far the steps properly precedent to the order have been taken. In this respect, the fiat at chambers is analagous to a writ, which the sheriff is bound to execute, though it be irregular; the distinction being between process voidable for irregularity, and process void by lack of jurisdiction of the subject.

Nor was it the duty of the sheriff to notify the plaintiffs in the execution, of the receipt of the judge's order. He was justified in presuming that all had been rightly acted; and could not with propriety, or for any purpose of legal effect, inquire further. Some degree of diligence was due from the plaintiffs; and an application from them to the judge, would doubtless have procured a rescission, or at least a modification of the order, by the annexation of a condition preservative of their priority of lien. *Clark v. Manns*, 1 Dowl. P. C. (Eng.) 656; Bagly's Prac. 29. Either of these courses was within the power of the judge. The first would probably have been pursued, had he, on inquiry after summons, been satisfied his order was irregular and improperly obtained. The latter might have been effected by a direction to stay proceedings, after levy [*248] made, the levy to remain as security. But lacking any motion of this sort, it certainly lies not in the mouths of the plaintiffs to impeach the sheriff of misfeasance in the non-execution of the *fieri facias*. His hands, as we have seen, were tied. It is not enough to aver the plaintiffs knew nothing of the order, and could therefore take no steps for its abrogation or amendment. The answer is, they might have known it, had they inquired of the sheriff touching the non-execution of the writ, an inquiry as commonly made as it is natural.

That they did not do this, is their misfortune, if not their fault; the consequences of which are not to be visited upon the officer, who is in no default. The truth is, the inceptive error was committed by the judge; first, in acting upon an *ex parte* hearing, and next, in granting an unconditional order, without respect to the rights of the plaintiffs. The results of this mistake, in this particular case, ought to warn the associate judges of the commonwealth, who are not expected to be learned in matters of law, against a similar interference with process, without an opportunity first given to the antagonist party to be heard. The English mode of procedure in such cases is clearly pointed out in Bagly's Practice, at Chambers, cap. 1, and being well calculated to protect the rights and interests of all parties, should be followed, here, as closely as possible.

The inquiry recurs, what was the effect of the judge's order? Certainly to hang up the execution until after the return day. Its functions were thus suspended until, by the lapse of time, its vitality was extinguished. Beyond the return day, its operation and vigor could only have been preserved by an actual levy; or rather, the effect of the levy being to place the goods *in gremio legis*, they would have so remained for satisfaction of the plaintiffs' execution, unless released by their consent or misconduct, or by operation of law. But a levy under the first execution being wanting, it had no hold on the goods after the return day. Consequently, the second execution was the only effective one in the hands of the sheriff at the time of the sale of the goods. The proceeds were therefore properly applied in satisfaction of it.

* * * [*249]

Judgment affirmed.

The court's power of control over its process as stated is recognized everywhere (8 Ency. Pl. & Pr. 460), but the powers of a judge at chambers is a more vexed question. Clearly without statute he has no power in vacation to render judgments or to set them aside. *Fisk v. Thorp*, 51 Neb. 1; 4 Ency. Pl. & Pr. 347. But power of control over process of the court stands on different ground, for often delay till the next term of court would work irreparable injury. Therefore, though the judge at chambers probably has no power to quash the execution (*Freeman v. Dawson*, 110 U. S. 264), it seems clear that he may stay it till the question can be heard in court. See *Freeman on Ex.*, §32. See also *Lockhart v. McElroy*, 4 Ala. 572; *Sanchez v. Carriaga*, 31 Cal. 170.

This is a strong case in favor of the sheriff, as to the time within which he must levy. See *Albrecht v. Long*, post, p. 336, and notes; also 22 Am. & Eng. Ency. L. (1st Ed.) 542.

As to effect of stay before levy compare *Richards v. Morris C. & B. Co.*, post p. 394.

The Protection and Powers Given the Officer by the Writ.

HAMNER v. BALLANTYNE, in Utah Sup. Ct., April 9, 1896—13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

Action by John Hamner against Thomas Ballantyne. Judgment for plaintiff. Defendant appeals.

ZANE, C. J. This is an appeal by the defendant from a judgment against him, in favor of the plaintiff, for the sum of \$268.50 and for costs, and from an order refusing a motion for a new trial. With other facts, the plaintiff alleged, in his complaint, that he was the owner of \$242.85, and that the defendant carried it away, and unlawfully converted it to his own use, to plaintiff's damage in the sum of \$242.85, with interest. To this complaint the defendant filed an answer, in which he justified such taking and conversion under an execution, which he made a part thereof. The execution recites a judgment against the defendants, John Hamner and others, and appears to be fair on its face. The defendant stated further, in his answer, that, in obedience to the execution, he demanded the amount due thereon, and that plaintiff paid to him the \$242.85 in satisfaction thereof, and that he returned said sum, with the execution and his return thereon, to the clerk's office. The execution and return thereon established the above facts, with the additional one that the \$242.85, less the costs, were paid to Hamner's attorney.

On the trial of the cause the defendant offered the execution [*329] with the return thereon in evidence, and the court having sustained the plaintiff's objection to its admission, defendant excepted, and assigns such refusal as error. This assignment of error raises the question, was the execution admissible in evidence, without the judgment upon which it issued? The writ required the officer to demand of the defendants the sum mentioned in it, and, upon refusal to pay, to levy upon and sell enough of their unexempted personal property to satisfy the same, and, if enough could not be found, to levy upon and sell enough unexempted real property. In demanding and receiving the money due on the execution, and crediting the same, the officer obeyed the commands of the writ, and he was protected by the writ in so doing. An officer with an execution in his hands is not authorized to demand payment from a person not a party to it, or to levy on the property of any other person. If he levies on property

in the possession of a person, not a party who claims a right to it, he must produce the judgment with the execution under a plea of justification; because possession is *prima facie* evidence of ownership. The officer is apprised, by the possession and the claim, that the person making it has the *prima facie* right according to his claim. However, we do not wish to be understood as holding that an officer would be justified in executing a writ against a person named in it as a defendant who was not a party to the judgment upon which it issued, or in executing a writ issued on a void judgment, after learning that such person was not a party to the judgment or that it was void or that there was no judgment. With such knowledge, we are of the opinion that the officer should not execute the writ. *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457. 60 Am. Dec. 393; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Leachman v. Dougherty*, 81 Ill. 325. There is a conflict in the authorities, however, as to this [*330] rule, but we think it sustained by authority and better reasoning. *Freem. Ex'ns.* (2d Ed.) § 102. But we cannot apply this rule to this case, because knowledge that the plaintiff was not a party to the judgment upon which the execution issued is not sufficiently shown by the evidence in the record. Notice of any irregularity or fraud in obtaining the judgment, or in the judgment itself, that simply renders it voidable, but not void, will not justify the officer in refusing to execute the writ, or render its execution by him wrongful, or make him liable for its execution. In that case, the judgment would be effectual until set aside, and such action must be left to the party whose rights are invaded.

The plaintiff claims that the issue tried in the court below between defendant and himself was simply a right to property; that the officer was not proceeded against as a tortfeasor. When the proceeding is one *in rem*, as in the case of an action of replevin, the better rule is that the officer, in justifying, must show a valid judgment as the foundation of the action, although the writ may be fair on its face, and he has no information that it has been issued on a judgment void for want of jurisdiction of the subject-matter or of the person, or without any judgment upon which to base it. If an officer in good faith, executes a writ, fair on its face, the writ protects him, though there was no judgment upon which to base it. Such a writ can only be used as a weapon of defense, and for protection,—not for the purpose of attack for offensive purposes. An officer, who in good faith seizes or

sells property under an execution, may justify, in a suit for damages against him in consequence of such seizure or sale, without producing the judgment; and he will be regarded as having acted in good faith, when the writ was fair on its face, and he was not advised that there was no judgment, or [*331] that, if there was, it was void. And it will make no difference whether the suit is for damages on an implied contract or upon a tort. A ministerial officer cannot be held personally liable in any proceeding, civil or criminal, for any act done by him in executing a writ fair on its face, unless he knows, or should have known, as a reasonable man, that the judgment upon which it purported to have been issued was void, or that there was no judgment. In the trial of the title or right to property in the officer's hands under the writ, he must, however, produce the judgment, though the writ is fair upon its face, and he has no knowledge that the judgment is void, or that there is none. Such a proceeding is against the property, or to recover it, and not to subject the officer to responsibility for his acts in obedience to the mandate of the court. *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 45; *Gidday v. Witherspoon*, 35 Mich. 368; *Cobbey*, Repl. §§ 806, 807; *Cooley*, Torts (2d Ed.) 542; *Leroy v. East Saginaw City Ry. Co.*, 18 Mich. 233, 100 Am. Dec. 162; *Adams v. Hubbard*, 30 Mich. 104.

The plaintiff alleged, in his complaint, that the defendant took \$242.85 of his money and unlawfully converted it to his own use. The plaintiff was a party defendant to the execution under which the officer, who is the defendant in this case, took the money; and the writ purported to be on a judgment against the plaintiff in this case, and was fair on its face; and the evidence does not show that the defendant knew that the judgment was void or that no judgment had been rendered against the plaintiff; and this case was not instituted to recover the specific money taken by the officer. It was brought to recover damages for the unlawful conversion of the money by the officer to his own use. If the plaintiff had waived the tort alleged, and sued for money had and received by the officer to plaintiff's use, [*332] it would not have been an action to try the title or right to the money merely. The effect of a judgment against the officer in that case would have made him personally responsible for acts performed, in good faith, on an execution against a defendant to it; but, as we have seen, the execution protected the officer for such acts, under such circumstances. While the former distinctions between civil ac-

tions in this state have been abolished, they will be regarded still as founded upon contract or tort from the facts alleged in the complaint. Actions in this state are classified with respect to the facts alleged. From the facts alleged, this action must be regarded as in trover. While in some cases the person whose property has been unlawfully converted into money or money's worth may waive the tort, and base his action on an implied contract for money had and received, the plaintiff based this one on the wrongful conversion of his money by the defendant. The action is not for the identical money which he alleges was converted, but he claims damages for the wrongful conversion of his money. The execution, being fair on its face, justified the conversion as the return shows it was made. The action could not be regarded as one to try the right to the money taken that had been paid to defendant's attorney before the suit was brought. It was for damages resulting to plaintiff, as claimed, from the wrongful and unlawful conversion of his own money by the defendant.

In sustaining plaintiff's objection to the execution offered in evidence by the defendant, we are disposed to think that the court below erred. The judgment and order appealed from are reversed, and the court below is directed to grant a new trial.

BARTCH, J., concurred.

[*333]

MINER, J. I concur, except that I am of the opinion that, in a case of trover, where the execution is fair and regular on its face, and issued by a court having jurisdiction, the officer would be protected by it, and cannot be held liable for its execution in a proper manner, even if he knew of irregularities or defects in the proceedings attending the issuing of the execution. See *Marks v. Sullivan*, 9 Utah 12, 33 Pac. 224, and cases referred to. See also *Matthews v. Densmore*, 109 U.S., 216, 3, Sup. Ct. 126.

WHITE v. WHITESHIRE, in King's Bench, Mich.¹ Term, 17 Jac. I, A. D. 1620—Palmer 52.

Trespass *quare clausum fregit*, breaking in the doors, entering the house, ejecting, &c. Defendant pleaded not guilty and justified the breaking that he was sheriff of the county at Southwick, and that a *fi. fa.* was directed to him to make execution of the goods of the plaintiff, and he made warrant to five of his bailiffs to make execution, and they found the house open and entered, and the plaintiff closed his house on them and im-

prisoned them for 24 hours, and the defendant to deliver them broke the house; and so peaceably being in the house, for execution of said writ, he broke the inner doors of the house, finding the first door open. On this the plaintiff demurred; and three objections were made to the justification: 1, that the authority to the bailiffs was to the five jointly, and only two made the execution; 2, according to *Semaine's Case* [5 Coke 91] on an execution of the subject a man may not break into the house of a party to make execution, because it is his castle and asylum, and admitting that he might break the first door, yet being in the house he may not break the interior of the house; 3, admitting that he might break the house, yet he should aver that there were goods in the rooms which he broke into.

On the first objection the counsel for the defendant said that it was often adjudged and they named *Abbingdon's Case* in the queen's bench, that bailiffs on such a warrant may make execution; 5, 2, 3, or 1, because it is the administration of justice and it is for the public good that execution should be made. Vid. Plowd. Com. 292; 4 Coke 46. DODDERIDGE, [J.], said that mere strangers to the warrant may aid the bailiffs in this case, and the whole court were against the plaintiff on this point.

To the second point the counsel of the plaintiff replied and made a distinction as to an execution lawfully commenced, on which the sheriff may well break into the house, and otherwise as to one not lawfully commenced, as in *Semaine's Case*, 5 Coke 91, 11 Coke 82; and here it was lawfully commenced, for the door was open, and they entered lawfully into the house, as is agreed in *Semaine's Case*. So that the plaintiff may not prevent the execution now, as he might if he had closed the door before the entry of the sheriff. On this the *case of Sir Wm. Fish* was cited, where this diversity was taken and agreed to as law; and the case was that the sheriff delivered to him through the window a *ca. sa.* to arrest said Fish, and seized him, and said Fish escaped from him, and the sheriff broke the door of the house immediately and retook him: and it was adjudged lawful, because there was a lawful commencement of the execution before; and so here he pursued an execution commenced. And the WHOLE COURT agreed to this diversity.

MONTAGUE, J. It is said that the house is a castle for him who lives in it, for his repose and safety, and that it is a privilege of the subject when it is closed; yet when the entry is lawful in the case of a minister of justice, and the occupant abuses his

privilege, makes resistance, and raises his hand against the officer of the king and the law, he destroys his privilege and has made resistance to the law, which will not protect him in such case; and this is the reason that whoever kills an officer of the law in the doing of his duty shall be a murderer.

DODDERIDGE, J. When a man has commenced lawful execution he that resists him resists the act of the law; and as is held in *Manxel's Case*, Com. 13, the possessions and land of each is charged with the execution of the law. And as to this which was said, that sheriff may not deliver the bailiffs of his own authority, but should sue out a *homine replegiando*, he said that it is against all reason that the officer of the law should be put to such inconvenience in the execution of his office.

HAUGHTON, J. If one is arrested by the sheriff and he escape to his own house, the sheriff may break in the doors of the house, pursue him, arrest, and resume his former custody, and the party may not have any benefit of his tort. And as to this that a master might not justify a battery of one to save his servant, he said that is not a like case; for the sheriff is an officer of the court, and should be punished for his misdemeanor in making execution.

As to the third point, counsel replied as to breaking the inner doors, that it was not necessary to allege that goods were there, for he could not know this before entry, and it should be presumed that a man has sufficient goods in his house. To this DODDERIDGE and HAUGHTON, JJ., agreed, and they said that if the sheriff was in one room he might break into another on refusal of admittance. Judgment against the plaintiff. And HAUGHTON, J., moved that the court, *ex officio*, may send process *de bene gerendo* and attachment on the plaintiff for this abuse of the officer of the law.

BURTON v. WILKINSON, in Vt. Sup. Ct. Franklin Co., Jan. Term, 1846—18 Vt. 186, 46 Am. Dec. 145.

Trespass *quare clausum fregit* by Albert S. and Oscar A. Burton against Curtis Wilkinson and L. H. Nutting, alleging that defendants, on Oct. 17th, 1842, broke open plaintiff's warehouse and took butter belonging to the plaintiffs. Defendants pleaded in justification, that Wilkinson, as a specially authorized officer, and Nutting, his servant, took the butter on an attach-

ment against one Cutter, having demanded the keys before breaking the door open. Then plaintiffs rejoined that the butter belonged, not to Cutter, but to one Houghton, for whom plaintiffs held. Defendants rebutted that Houghton had sued them for the taking, and judgment had been rendered against him. To this plaintiffs demurred. The court overruled the demurrer and plaintiffs excepted.

WILLIAMS. C. J. But two questions have presented themselves to the consideration of the court in this case. 1. As to the power of a person, specially deputed to serve a writ, in relation to the breaking of doors. 2. As to the claim set up by the plaintiffs under the title of Houghton.

A person deputed to serve a writ, as was the defendant Wilkinson, has all the powers which may be exercised by a sheriff in serving or executing any process, except that he is not to be recognized or obeyed as a sheriff, or known officer, but must show his authority, and make known his business, if required by the party who is to obey the same. In this particular he represents a special bailiff, rather than a known officer. To make an attachment, or to levy an execution on goods, the sheriff cannot break open the outer door of the debtor's dwelling house. It is otherwise, if the goods of a stranger are secreted in the dwelling house. A barn, or outhouse, adjoining to and parcel of the house, or within the curtilage, may be broken open to make such levy; but a request must first be made for admittance. A barn in the field may be opened without request. *Penton v. Brown*, 1 Keble, 698; *Haggerty v. Wilber*, 16 Johns. 287. There is nothing to prevent a sheriff from serving an execution in the night, as well as in the day time. Wilkinson [*190] was therefore justified in breaking into the warehouse in question, to serve an attachment on the goods of any person therein;—but he must first demand admittance.

In this case it is stated, that he did demand admittance of the persons who had the key, but it is objected, that the plea does not state but that the persons who had the key, were wrongfully in possession. We think this was not necessary. If he demanded admittance of those who had the custody and care of the key, and who could have let him in without compelling him to resort to force, it was all that was necessary; and he was not bound to inquire how, or in what way, they became possessed of the same. A demand of the plaintiffs for admittance could have been of no use, as they could not have unlocked the door, while

Bogue and Walker had the key. If there had been any collusion between the defendants and Bogue and Walker, which would have made the defendants liable, it should have appeared in the replication. A sheriff would have been justified in breaking open the warehouse of the plaintiffs to do execution on the goods of Cutter, having first demanded admittance of the person who had the key.* * *

The judgment of the county court is therefore affirmed.

Officer's Right to Special Indemnity and Fees.

SMITH v. OSGOOD, in N. Ham. Sup. Jud. Ct., Merrimack, Dec. Term, 1865—46 N. Ham. 178.

Trustee process by Smith against J. T. Osgood, principal debtor, and N. G. Ordway as his trustee. Abel Proctor & Son intervene as claimants. Case reserved for determination by the whole court.

Ordway seized some hemlock bark on several attachments against said Osgood, two in favor of Proctor & Son being the latest. Then Page claimed the bark, and Ordway demanded indemnity from the attaching creditors, but P. & Son were the only ones who gave it. Page then sued Ordway in *trover* for the value of the bark, which suit P. & Son successfully defended, without the aid of any of the other attaching creditors, all of whom knew of it. All of the attachment suits were prosecuted to judgment, executions thereon duly issued and delivered to Ordway, who then sold the bark thereon for \$403, which he had in his hands when this action was brought to charge him as trustee of Osgood therefor.

SARGENT, J. Where an officer is requested to attach property on a writ, if the title is doubtful he may demand an indemnity of the creditor before attaching it, and if such indemnity is not given he is under no obligation to attach it. *Perkins v. Pitman*, 34 N. H. 261; *Bond v. Ward*, 7 Mass. 123. So where the officer is directed to arrest the body of a debtor, if he has doubts about the propriety of the arrest, he may demand a like indemnity, and unless he receive it he is not obliged to make the arrest. *Marsh v. Gold*, 19 Mass. (2 Pick.) 284, 290.

The question here arises, whether, after the officer has attached property on *mesne* process without any controversy about

the title at the time, and he is afterwards proceeding to sell the same upon the writ, or upon the execution after judgment, and third persons then step in and claim the property and forbid the officer to sell the same, it is the duty of the officer to sell the property at his peril, or whether he may then demand of the creditor an indemnity, and refuse to sell unless such indemnity is given.

In this case it seems that all the executions were placed in the officer's hands within thirty days from the rendition of judgment, and if no indemnity had been claimed the property attached should have been applied in the order of the attachments. If the controversy as to the title had arisen in this case at the time of the attachment, and an indemnity had been demanded, there is no doubt that for the benefit of such creditors as gave the required indemnity, the officer must proceed and make the attachments in their order, and might decline to do anything for the others who did not give the indemnity, and we think the same rule should be applied in this case. We assume in this case, though the case is not quite explicit on that point, that the officer not only notified all the creditors, but that he made them understand fully the situation of the case, and demanded of them in terms the indemnity, and that they decided deliberately not to furnish the indemnity and risk the consequences. The officer should do this business so that there should be no room for misunderstanding or collusion. Page made his claim on the bark and insisted upon it, and brought his suit against the officer. These claimants gave the indemnity which the officer demanded. The other creditors did not. It would hardly be equitable now that the other creditors, who have stood by and neither given any indemnity nor assisted in the defense of the suit against the officer, should receive the whole benefit of the claimants' industry and money in defending that suit, and of their indemnifying bond, while the claimants themselves get nothing for their trouble and expense, nor any part of their claim, [*180] while those who incurred no liability and who did nothing, get the whole.

We think, in this case, if no one had indemnified, the officer might properly have refused to sell, and all the creditors would have been estopped to sue the officer, so far at least as the property claimed by Page was concerned, and that, as it was, he was only obliged to sell such property on the claimants' execution. No question is here raised concerning the application of any surplus after paying claimants' debt, for the case finds that the avails

of the whole bark are not sufficient to pay the first execution of these claimants.

But the plaintiff claims that, because the officer did not make the application upon the execution at the time, he cannot now do so, but that the money belongs to Osgood, the principal defendant, and can be held in this suit in the hands of the officer as trustee. But we cannot so regard it. If the property in this case had been delivered to a receipt, who had refused to deliver it on demand, and, after execution was recovered, the officer had brought suit on the receipt, and had after a long time recovered, and suppose he had kept his execution till the termination of the suit, though long after the return day of the execution, could he not be allowed to apply the property on the execution? It might have been the more proper course for the officer in each case to return his execution on the return day, making return of whatever he had done up to that time, and take a new one on which to make a future return. In this case the officer delayed from uncertainty as to which execution he should make the application upon. He should perhaps have returned them with his doings, and asked directions from the court as to the application of the money. But this suit was soon brought in which the officer's liability would be settled, and he has waited till now. We think he may now make the application, and that no one but the creditor can complain of the delay, who is the claimant in this case.

Trustee discharged.

Refusal to indemnify was held a good defense to an action against the sheriff for the proceeds given to the creditors who did indemnify. *Cudahy v. Rhinehart*, 133 N. Y. 248, 30 N. E. 1004.

In an action against the sheriff for not selling, the failure of the creditor to furnish bond on demand was held a good defense. *Robey v. State*, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

A constable sued for releasing goods for want of indemnity after expressing satisfaction with the indemnity given, is liable. "If, as the constable said, property in the goods was claimed by another, he was not bound to proceed unless sufficient indemnity was given; but having demanded and accepted indemnity, the situation of affairs is entirely altered. He is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity." *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 368.

See extended note in 89 Am. St. Rep. 413, on right of officer executing process to demand indemnity.

STUDLEY v. BALLARD, in Mass. Sup. Jud. Ct., Oct. 20, 1897—169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286.

[*295] HOLMES, J. The place of seizure was the town of Hampden. The plaintiffs lived in Palmer. There were other deputies nearer, but the defendant especially desired and requested the plaintiffs to do the work, and promised to pay them. The case is here, after a finding for the plaintiffs by a judge without a jury, upon an exception to a refusal to rule that the contracts were without consideration and illegal. That broad question is the only one before us. It appears that the plaintiffs, at the defendant's request, went to Springfield to get evidence upon which to found complaints, and advise as to the best manner in which to proceed in serving the warrants, and subsequently made complaints, obtained warrants, and served them. We must assume that the judge found that the defendant's promises referred to the preliminary [*296] or outside work and expenditures, and that the trips to Springfield recovered for fall within the promises as thus construed. No question is raised by the exceptions on these points.

It follows that the exceptions must be overruled. The rule of law is simple. A contract to pay an officer for doing his official duty, or to pay him a sum in addition to his statutory fees, cannot be enforced; *Pool v. Boston*, 5 Cush. 219; *Brophy v. Marble*, 118 Mass. 548; *Hatch v. Mann*, 15 Wend. 44. But a contract is good to pay him for services outside the line of his duty for which the law allows him no fee: *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315; *Trundle v. Riley*, 17 B. Mon. 396; *England v. Davidson*, 11 Ad. & E. 856. In *Shattuck v. Woods*, 1 Pick. 171, 175, it is said that, if an officer returns an execution unsatisfied by consent of the creditor and has incurred any expense, he must look to the creditor for his recompense.

We cannot say that the plaintiffs have been allowed to recover for anything except their time, travel, and outlay in order to get information before filing the complaints. In *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315, a deputy sheriff who went in pursuit of escaped prisoners and recaptured them was held entitled to a reward which had been offered. In these cases, as in that, the plaintiffs were under no 'specific official obligation' to look up information, and, apart from the defendant's promises, would have been entitled to no pay for their trouble or expense. It does not appear that what they did fell within Pub. Stat. c. 100,

§ 43, and it is unnecessary to consider what the effect of that section would be.

Exceptions overruled.

An elaborate review of the cases on this point will be found in *Crofut v. Brandt*, 58 N. Y. 106, 17 Am. Rep. 213.

"It is a principle of the common law that an officer ought not to take money for doing his duty. Hawkins says: 'If once it should be allowed that promises to an officer to pay more for his services than the law allows could sustain an action, the people would quickly be given to understand how kindly they would be taken, and happy would be that man who could have his business well done without them.' 1 Hawk, P. C. c. 68, § 4. This is an ancient principle, and it has been steadily adhered to as being necessary to save the community from extortion and oppression." *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658.

Where the statute specified fees for each act done, including a percentage of the amount collected, an officer who had made a levy on land on execution was held not entitled to percentage as for a collection though he could have sold the land for enough to satisfy the demand but for the order of the creditor forbidding it. *Peck v. City Nat. Bank*, 51 Mich. 353, 16 N. W. 681.

NELSON v. COOK, in Ill. Sup. Ct., Ottawa, June Term, 1856—17 Ill. 443.

Assumpsit commenced by attachment by Isaac Cook, late sheriff of Cook county, against John G. Nelson and others, to recover damages paid by said Cook on judgment against him in favor of the owners of property taken by Cook's deputy on execution in favor of said Nelson et al. on their judgment against A. F. Miller and D. R. Clements. From judgment for plaintiff defendants bring error.

SCATES, C. J. The principle laid down in *Merryweather v. Nixan*, 8 Term 186, that there is no right of contribution as between tort-feasors, or trespassers, has been and still is, recognized as unquestionable law. But this does not affect the right of indemnity where a right of indemnity exists.

There has been some little diversity of opinion, in the proper application of the rule of distinction, or exception to the general rule, in *Merryweather v. Nixan*, in agreeing upon the facts and circumstances, which raise the exception. I regard the following distinctions, however, to be well settled and supported by authority. Where a party is employed in his usual course of business, as an auctioneer or warehouseman, to sell or deliver goods, by one claiming to have right so to do, and the contrary is not known to the employee, he may have an action for an implied promise of indemnity, for the damages he may be compelled

to pay to the true owner, for the trespass or conversion committed by such sale or delivery. *Betts v. Gibbons*, 2 Ad. & El. 57, 29 Eng. C. L. 37; *Adamson v. Jarvis*, 4 Bingh. R. 66, 13 Eng. C. L. 403; Story on Agency, § 339. But where one is employed or directed to do or commit a known crime, misdemeanor, trespass, or wrong, and the employee or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law. Story on Agency, § 329; Broom's Leg. Max. 328, 329; *Holman v. Johnson*, 1 Cowp. (Eng.) 341; *Coventry v. Barton*, 17 John. (N. Y.) 142.

Yet, where the question of title to the property is one of doubt, controversy or uncertainty, or the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act, does not know that it is a wrong or trespass; in such case he may sue and recover indemnity from his employer, upon an implied assumption to save him harmless for the act. See authorities last above, and note to *Farebrother v. Ansley*, 1 Campb. 343; *Gower v. Emery*, 18 Me. 79, 83.

This relation, however, of principal and agent, or employee, is not raised by the simple delivery of a writ of *capias*, attachment, *fiery facias* and the like, to the officer, or his deputy. There is no implication of indemnity for their trespasses and wrongs in the execution, or attempt to execute process put into their hands, without any specific direction to do particular acts, or take particular goods under it. This is illustrated as between the sheriff and his deputy, in the case of *Farebrother v. Ansley*, 1 Campb. 343; and in relation to the liability of plaintiffs in process to the sheriff, by *Wilson v. Milner*, 2 Campb. 452; *England v. Clark*, 5 Ill. (4 Scam.) 486; *Coventry v. Barton*, 17 [*450] John. 142; *Averill v. Williams*, 1 Denio (N. Y.) 502; *Humphreys v. Pratt*, 2 Dow. & Clark (Eng.) 288, 5 Bligh N. S. 154; referred to in 6 M. & W. Ex. R. note 387; *Marshall v. Hosmer*, 4 Mass. 60; *Bond v. Ward*, 7 Mass. 123; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Fitler v. Fossard*, 7 Pa. St. 540; *Saunders v. Harris*, 4 Humph. (Tenn.) 72. The facts in *Gower v. Emery*, 18 Me. 79, show a special direction, or will justify its inference, and what the court say must be understood as upon the case before them.

Under these well settled principles, the defendant is not entitled to recover, upon an implied indemnity, nor without an express promise, or particular directions about the levy. Proof that plaintiffs endeavored to sustain the attachment upon the levy, is wholly insufficient for this purpose, and none other appears.

Again, a recovery in trespass for taking, or in trover for converting chattels, followed by satisfaction, vests the property in the defendant: "*Solutio pretii emptionis loco habetur.*" *Adams v. Broughton*, 2 Strange 1078; *Cooper v. Shepherd*, 3 Mann. G. & S. 266, 54 Eng. C. L. 265.

Thus treating the sheriff as agent, in whom the property was vested by the recovery, for the benefit of the plaintiffs, his principals, he may forfeit his title to repayment of his advances and disbursements, by his own gross negligence, fraud or misconduct, and be excluded from all remedy against his principal. Story on Agency, § 348. The defendant misapplied the property, and converted it to his own use by a sale and payment to another, of the proceeds.

Judgment reversed and cause remanded.

If the judgment creditor expressly directed the levy on the specific property, which did not belong to the judgment debtor, he is liable to the owner in trover either jointly with the officer or alone. *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143, and note to same case in 15 Am. Dec. 150; *Walker v. Wonderlick*, 33 Neb. 504, 50 N. W. 445.

Liability of the Officer and His Bond.

LAMMON v. FEUSIER, in U. S. Sup. Ct., Mar. 17, 1884—111 U. S. 17.

The original action was brought in the circuit court of the United States for the district of Nevada, by Henry Feusier, a citizen of California, against George I. Lammon and three other persons, citizens of Nevada, upon a bond given by Lammon, the marshal of the United States for that district, as principal, and by the other defendants as his sureties, and conditioned that Lammon, "by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal." [*18] It was alleged in the declaration and found by the court (trial by jury having been duly waived) that Lammon, while marshal, and while the bond was in force, having in his hands a writ of attachment on mesne process against the property of one E. D. Feusier, levied it upon the goods of the plaintiff, a stranger to the writ. On the question of law, whether the taking of the plaintiff's property upon a writ of attachment against another person constituted a breach of official duty on Lammon's part for which his sureties were liable, the circuit judge and the district judge were opposed in opinion, and so certified. The plaintiff having died pending

the suit, final judgment was rendered for his executors, in accordance with the opinion of the circuit judge; and the defendants sued out this writ of error.

GRAY, J. The bond sued on was given under § 783 of the Revised Statutes, which requires every marshal, before entering on the duties of his office, to give bond with sureties for the faithful performance of those duties by himself and his deputies; and this action was brought under § 784, which authorizes any person, injured by a breach of the condition of the bond, to sue thereon in his own name and for his sole use.

The question presented by the record is whether the taking by the marshal upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.

The marshal, in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person, and a taking, upon the writ, [*19] of the property of another person, or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of the property of another person is wrongful; but each being done by the marshal, in executing the writ in his hands, is an attempt to perform his official duty, and is an official act.

A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any other wrongdoer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal, nor the writ of attachment, affords him any defense to such an action. *Day v. Gallup*, 69 U. S. (2 Wall.) 97; *Buck v. Colbath*, 70 U. S. (3 Wall.) 334.

But the remedy of a person, whose property is wrongfully taken by the marshal in officially executing his writ, is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government, for the indemnity of all persons injured by the official misconduct of himself or his deputies :

and his bond may be put in suit by and for the benefit of any such person.

When a marshal, upon a writ of attachment on mesne process, takes property of a person not named in the writ, the property is in his official custody, and under the control of the court whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way, except in the court from which the writ issued. *Freeman v. Howe*, 65 U. S. (24 How.), 450; *Krippeendorf v. Hyde*, 110 U. S. 276. The principle upon which those decisions are founded is, as declared by Mr. Justice Miller in *Buck v. Colbath*, above cited, "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over [*20] the court whose process has first taken possession, or some superior jurisdiction in the premises." 3 Wall. 341. Because the law had been so settled by this court, the plaintiff in this case failed to maintain replevin in the courts of the state of Nevada against the marshal, for the very taking which is the ground of the present action. *Feusier v. Lammon*, 6 Nev., 209.

For these reasons the court is of opinion that the taking of goods, upon a writ of attachment, into the custody of the marshal, as the officer of the court that issues the writ, is, whether the goods are the property of the defendant in the writ or of any other person, an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office.

Upon the analagous question, whether the sureties upon the official bond of a sheriff, a coroner, or a constable are responsible for his taking upon a writ, directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several states.

The view that the sureties are not liable in such a case has been maintained by decisions in the supreme courts of New York, New Jersey, North Carolina and Wisconsin, and perhaps receives support from decisions in Alabama, Mississippi and Indiana. *Ex. parte Reed*, 4 Hill, (N. Y.) 572; *People v. Schuyler*, 5 Barb. Sup. (N. Y.) 166; *State v. Conover*, 28 N. J. L. (4 Dutcher),

224; *State v. Long*, 8 Iredell (N. Car.) 415; *State v. Brown*, 11 Iredell, 141; *Gerber v. Ackley*, 32 Wis. 233, 37 Wis. 43; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *Brown v. Moseley*, 11 Sm. & Marsh. (Miss.) 354; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State*, 34 Ind. 105.

But in *People v. Schuyler*, 4 N. Y. 173, the judgment in 5 Barb. 166 was reversed, and the case *Ex parte Reed*, 4 Hill, overruled by a majority of the New York court of appeals, with the concurrence of Chief Justice Bronson, who had taken part in deciding Reed's case. The final decision in *People v. Schuyler* has been since treated by the court of appeals as settling the law upon this point. *Mayor, etc., of New [*21] York v. Sibberns*, 3 Abbott App. 266, 7 Daly, 436; *Cumming v. Brown*, 43 N. Y. 514; *People v. Lucas*, 93 N. Y. 585. And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas and California, and in the supreme court of the District of Columbia. *Carmack v. Commonwealth*, 5 Binn. (Pa.) 184; *Brinott v. M'Kee*, 6 W. & S. (Pa.) 513; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Greenfield v. Wilson*, 79 Mass. (13 Gray) 384; *Tracy v. Goodwin*, 87 Mass. (5 Allen.) 409; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Grattan, (Va.) 124; *Commonwealth v. Stockton*, 5 T. B. Monroe (Ky.), 192; *Jewell v. Mills*, 3 Bush. (Ky.) 62; *State v. Moore*, 19 Mo. 366; *State v. Fitzpatrick*, 64 Mo. 185; *Charles v. Haskins*, 11 Iowa, 329; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Texas, 23; *Van Pelt v. Littler*, 14 Cal. 194; *United States v. Hine*, 3 MacArthur, (D. C.) 27.

In *State v. Jennings*, above cited, Chief Justice Thurman said: "The authorities seem to us quite conclusive, that a seizure of the goods of A, under color of process against B, is official misconduct in the officer making the seizure; and it is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer under color of a *fi. fa.* seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he take the goods of a third person? If the ex-

emption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community [*22] with no other indemnity against official misconduct than the responsibility of the officer might furnish." 4 Ohio St. 423.

So in *Lowell v. Parker*, 10 Met. 309, 313, a constable, authorized by statute to serve only writs of attachment in which the damages were laid at no more than \$70, took property upon a writ in which the damages were laid at a greater sum. In an action upon his official bond, it was argued for the sureties that they were no more answerable than if he had acted without any writ. But Chief Justice Shaw, in delivering the opinion of the supreme judicial court of Massachusetts, overruling the objection, and giving judgment for the plaintiff, said: "He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean, for whose use and benefit this action is brought, and who, therefore, may be called the plaintiff. He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Upon the weight of authority, therefore, as well as upon principle, the judgment of the circuit court in the case at bar is right, and must be

Affirmed.

BOUCHER v. WISEMAN, in Common Pleas of England, Mich. Term, 37 & 38 Eliz.; A. D. 1596—Cro. Eliz. 440.

Before Anderson, C.J., Beaumont, Walmsley, and Owen, JJ.

Action upon the case against the defendant, late sheriff of Essex. Whereas the plaintiff had recovered against Pynder 100*l.*, and had a *fieri facias*; that the defendant by virtue thereof levied 28*l.*, and had not returned the writ nor paid money to the plaintiff. Defendant pleaded not guilty. And now upon evidence to the jury it was proved that the writ was delivered to Cowell, the defendant's under-sheriff, 9 Nov., 34 Eliz., and the same day he made execution. And he proved, that the same day a writ of

discharge was delivered to him, dated 6 Nov., 34 Eliz. But because he did not prove that he had notice of this writ of discharge before the execution served, THE COURT held clearly that he was yet sheriff, and chargeable to the plaintiff's action.

The defendant also showed the indenture whereby he made Cowell his under-sheriff; wherein was an exception, that he should not meddle with the execution of any writ above 40*l.*; so as to that he was not his under-sheriff, but he did it *de son tort demesne*, and the defendant is not chargeable therewith. But all THE COURT held it to be a void exception: for when he made him his under-sheriff, therein was included that he should execute all writs; and therefore the exception is repugnant and void.

Thirdly, it was alleged, that this was not a due execution; for Pynder had made a deed of his goods before, &c., and showed the deed dated the same day of the writ of execution. ET PER TOTAM CURIAM, although the gift were *bona fide*, yet the execution might be taken of those goods. For by the suing forth the execution, all the defendant's goods are liable; so as no gift of the said goods, the day of the date of the writ or afterwards, can stop the execution. Wherefore, they resolved the jury accordingly, without inquiring of the fraud, and they found for the plaintiff. Vide 4 Hen. 6, pl. 7; 17 Ass. pl. 2; Eliz. Dyer 219.

PAYNE v. DREWE, in King's Bench of England, Feb. 8, 1804, 44 Geo. III—4 East 523.

Before Ellenborough, C.J., Grose, Lawrence and LeBlanc, JJ.

Action by Payne against Drewe as sheriff of Dorset, for a false return *nulla bona* to a *fi. fa.* on a judgment against C. Sturt. Judgment for plaintiff. The sheriff first took and inventoried sufficient goods of the execution defendant to satisfy the *fi. fa.*, but afterward quitted possession of them and returned his writ *nulla bona*, because before his writ was issued the court of chancery had ordered a commission of sequestration on the complaint of H. W. Portman *et al.* against said C. Sturt to compel payment of 2000*l.*

LORD ELLENBOROUGH, C.J. * * * We shall, for the purpose of the present question, assume that the award of the sequestration had the same obligatory effect as the award of a writ of execution against the goods would now have at the common law, and shall even further assume, * * * that a sequestration binds from

the very time of awarding the commission, * * * in which respect it is put upon the footing of an execution at the common law, * * * before the statute of frauds, and which execution at common law then related to the *teste* or award of the execution; I say, thus considering the effect of a sequestration for the purpose of this question (and in so considering it we allow it the most extensive effect which can possibly be claimed on its behalf), it still does not appear to us that the sequestration in question did, under the circumstances, afford a sufficient excuse to the sheriff for not executing the writ of *feri facias* at the suit of the plaintiff. The sheriff is not excused, if the sale he was required to make under the *feri facias* would, if made, have been a valid and effectual one in favor of his vendee: and, if he would not, by making such sale thereunder, [*538] have subjected himself either to the action of the party interested in the sequestration, or to the punishment of the court of chancery as for a contempt of its process. Whether the sale he would have made, supposing he had sold under the *feri facias*, would have been a valid and effectual one, depends upon the sense in which, and the extent to which, goods shall be considered as *bound* by the award of an execution before the statute of frauds, and by the delivery of the writ of execution since that statute. The sense in which, and extent to which, goods are in either case said to be *bound* is, that it binds the property as against the party himself and all claiming by assignment from, or representation through or under him: but it does not so vest the property in the goods absolutely as to defeat the effect of a sale thereof made by the sheriff under an execution. This was settled in the case of *Smallcomb v. Cross* [reported, *post*, 391].

* * *

Assuming, therefore, upon these authorities of Lord *Holt* and Lord *Hardwicke*, and particularly on the authority of the case of *Smallcomb v. Cross*, &c. as decided by Lord *Holt*, and which has been generally received and referred to as the established law on the subject, that the sheriff could have made a valid and effectual sale in this case; the next questions are, Would he, by executing the writ of *feri facias*, have subjected [*542] himself to the action of the party to the sequestration, or to punishment by the court out of which it issued? As to the first of these questions, it is certainly to be answered in the negative. What pretence of complaint can he have against the sheriff who gave no notice of that process in deference to which the sheriff was to forbear to levy, which he might easily have made available by ordinary diligence, and who took no steps for 18 months to make it so? *Vig-*

ilantibus non dormientibus leges subveniunt. If he did not enforce it during that period, at what period was it to be expected that he would do so? The commission extends to Mr. *Charles Sturt's* goods not in the bailiwick of one sheriff only, but throughout the whole realm. Were all his majesty's subjects to hold their means of remedy against the personal estate of Mr. *C. Sturt*, in whatever county they might be found, in suspense and abeyance till the parties, to the sequestration should think fit to avail themselves of theirs? * * *

As to the light in which the court of chancery would view an execution at common law, executed [*543] under these circumstances; the contempt, if any, which that court would probably animadvert upon would be a contempt of its own process by those who had procured it to be awarded, and the commissioners who were empowered, and who instead of putting it in force, suffered it to become the means of protection to him against whom it was granted and required to act under it. As against these parties, and also against Mr. *C. Sturt*, the defendant in the execution, the sheriff may, if he can make out a case of collusion between them, yet perhaps be able to obtain some relief by the intervention of that court in his favor. That protection and a full indemnity he might have had for asking for in the first instance from that court; or this court would, upon his application, have enlarged the rule upon him to return the writ of *feri facias*, unless the plaintiff would have indemnified him against the sequestration; so that if he now stand unprotected against the action of the plaintiff, it is by his own neglect that he does so. * * *

The case of *Hutchinson v. Johnston*, 1 Term Rep. 729; in which it was holden, that where two writs of *feri facias* against the same defendant are delivered to a sheriff on different days, and no actual sale of the defendant's goods is made, the first execution must have the priority, may be supposed, on the first view of it, to lay down a doctrine somewhat contrary to what has been already stated; but that case appears to me to decide only that where two writs of *feri facias* are delivered to the same sheriff, he must, as between himself and the several plaintiffs in those executions, sell under that writ which is first delivered, although he may have first seized under the last delivered writ. But in the present case there are two different writs or authorities, each so far binding the goods as to warrant a sale under them, one delivered to the sheriff, and another previously delivered to other persons, equally competent with the sheriff to have seized under them. And the question is not which of two writs, equally *mandatory* to

the same person, shall have a priority in point of execution by him, but whether one writ mandatory to the sheriff for one purpose shall remain in his hands wholly suspended in point of execution, merely because other persons having a similar competent authority under other process of another court to them directed have chosen [*545] to neglect the execution of such last-mentioned process; which brings the question nearly to this, namely, Whether a writ which is from the delivery immediately binding as against the defendant, so as to tie up his hands from alienating the goods which might be seized under it, is to be regarded as in effect self-executed by its own proper legal effect and force for all purposes? That it is not, the case of *Smallcomb v. Buckingham* decides; for if it were so, then any sale made by the sheriff under a second execution, when he had a former one in his hands, would be a nullity in respect even to the sheriff's vendee thereof, which would directly contradict what was established in that case. It appears to me, therefore, not to be contradictory to any cases, nor any principles of law, and to be mainly conducive to public convenience, and to the prevention of fraud and vexatious delay in these matters, to hold that *where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.* In this case, being of opinion that the sheriff would not, by executing the writ of execution to him directed, have subjected himself either civilly or criminally to any inconveniences, we think that he ought to have done so; and not having done so, he has made himself liable to this action, in which we are of opinion that the plaintiff is entitled to recover.

Postea to the Plaintiff.

RUSSELL v. LAWTON, in Wis. Sup. Ct., June Term, 1861—14 Wis. 202, 80 Am. Dec. 769.

Action against sheriff. From judgment for plaintiff defendant appeals.

COLE, J. * * * On the 9th day of February, 1859, the appellant as sheriff of Rock county, had delivered to him an execution in favor of the Bank of Beloit against the Racine and Mississippi Railroad Company, and by direction of the judgment creditors, levied the same upon eleven hundred and ten dollars

coin, the money of the railroad company, and paid it over as money made upon the execution. On the preceding 4th day of February, an execution in favor of the respondent and against the same defendants was delivered to Sydney Wright, a deputy of the appellant, which was returned unsatisfied for the reason that the officer could find no property upon which to levy. The respondent has brought this action to recover the amount of the execution delivered to Wright, insisting that because it was placed in the hands of the deputy before the junior execution was delivered to the sheriff, it should first be satisfied, and that the sheriff was guilty of misconduct in not thus applying the money that came to his hands, instead of paying it over to the bank. At the same time it is conceded that the sheriff acted in perfect good faith in the matter, *and that when he levied upon and paid over the money to the bank, he had no notice whatever that his deputy held any execution against the same debtor.* In view of these facts, upon what principle is it sought to charge the appellant in this action? It is this. A delivery of an execution [*207] to a deputy sheriff is said in legal effect to be a delivery to the sheriff himself, since, in contemplation of law, all the deputies of the sheriff are but one officer, being all servants of the same master, and that, therefore, the sheriff must be held chargeable with constructive notice of the prior execution in the hands of his deputy. And upon this fiction of the law the whole case hinges.

It is undoubtedly true that for many purposes a sheriff and his deputies are regarded as one officer, in the sense that an official act of the deputy is deemed the act of the sheriff, and the sheriff is held responsible for such act as his own, though he may have had no personal knowledge of the matter, and been individually guilty of no wrong. All processes are directed to the sheriff as such, who is required to do the thing therein commanded to be done; and the sheriff is responsible to the world for all breaches of duty or official misconduct on the part of any of his deputies. For this reason an action for a breach of duty of the office of sheriff must be brought against the high sheriff, though the breach was by the default of the under sheriff. *Cameron v. Reynolds*, 1 Cowper (Eng.) 403. In this sense the sheriff and his deputies may be said to constitute one officer. But still the deputies of a sheriff, in relation to each other, must often be considered as several officers, with distinct rights, and acting with distinct liabilities. *Odiorne v. Colley*, 2 N. H. 66; *Vinton v. Bradford*, 13 Mass. 114; *Thompson v. Marsh*, 14 Id., 269; *Bagley v. White*, 21 Mass. (4 Pick.) 395 * * * [*208] * * * Take a case suggested on the

argument, and which will occur to any one reflecting on the subject. An execution against A is put into the hands of a deputy, who knows of no property belonging to A to satisfy the same. Another deputy has information of property possessed by A sufficient to satisfy the execution, but has no knowledge that an execution is out against him. The sheriff has no knowledge of any execution against A, or of any property belonging to him. Under these circumstances, is the sheriff to be charged with constructive notice of the execution in the hands of one deputy, and of the information possessed by the other in respect to property belonging to the debtor, and thus held liable for a breach of duty in not making the money on an execution which he never saw? To contend for such a proposition would seem little else than the most glaring absurdity; and yet we see no escape from such a result, if the maxim that the sheriff and his deputies are to be regarded as one person, is to be accepted without limitation. * * * [*210]

It follows from these views, that the judgment of the circuit court must be reversed, and a new trial ordered.

Reversed.

Compare *Ferguson v. Williams*, 3 B. Mon. (Ky.) 302.

KNOX v. WEBSTER, in Wis. Sup. Ct., June Term, 1864—18 Wis. 406, 86 Am. Dec. 779.

Action by Thomas M. Knox against Webster as sheriff of Milwaukee county, for failure to levy plaintiff's execution before another subsequently placed in his hands. From judgment for plaintiff defendant appeals. The main defense was that the other execution creditor found and showed the sheriff the property on which to levy and was entitled to priority for his diligence.

DIXON, C. J. "Personal property shall be bound from the time of its seizure on execution." R. S. ch. 134, § 18. Before seizure there is no lien—nothing by which the rights of different execution creditors, whether senior or junior, can attach. The lien takes effect from the date of the levy and by virtue thereof, and of course is confined to the execution levied, and can have relation to no other. Such lien is prior and superior to that of every execution subsequently levied, and consequently not liable to be defeated by such subsequent levy, though made upon a senior execution. This point, if not decided, was strongly intimated in *Russell v. Lawton*, 14 Wis. 209. It follows that the court was right in rejecting the record and proceedings upon the

motion to have the money made on Cooper's execution applied on that of the plaintiff. The court had no power to make such application, and was bound to deny the motion. The plaintiff having wholly mistaken his remedy, the decision upon the motion was no bar to this suit, and that was the only purpose for which the record and proceedings were offered.

As to the duty of the sheriff in making the levy, we are [*410] satisfied he should have levied the senior execution first. The decision in *Russell v. Lawton* proceeded on this supposition in all cases where the several executions are in the hands of the same officer. The statute, § 15, requires the sheriff, under the sanction of his official oath, to indorse upon every execution the year, month, day and hour of the day when he received the same. No reason is perceived for this, unless it be to furnish unequivocal and satisfactory evidence upon which to determine disputed questions of priority and preference among different execution creditors of the same debtor, and to enable the sheriff to guard against mistakes. He is a public officer, of whom the law requires the strictest impartiality between those who are obliged to have his services, and this impartiality cannot be enforced except upon the rule that he must, at his peril, levy and satisfy executions according to their seniority in his hands. Once allow it to be a race of diligence between the different creditors in finding and pointing out the property of the debtor, and what a door to partiality, fraud and strife would be opened! The sheriff might neglect inquiry, or be willfully ignorant, for the sake of favoring one or oppressing another creditor, and the whole controversy would be thrown upon the uncertain testimony of interested and suspicious witnesses. We do not doubt, therefore, that it was the intention of the legislature, as it is the course of reason, that executions should be levied according to seniority, and that the sheriff in this case was not justified in levying the junior execution first because the creditor in that execution had been more successful than himself in finding the property of the execution debtor.

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Judgment affirmed.

A junior creditor, learning that the sheriff had no special orders to levy, but only to summon a garnishee on the senior *fi. fa.*, ordered him to levy his *fi. fa.* on certain corn. Sheriff levied both writs at same time. The senior writ held entitled to priority, because it is the sheriff's duty to levy on any property without special orders. *Stuarts v. Reynolds*, 4 Harrington (Del.) 112. See also *Tomlinson v. Rowe*, Lalor's Supp. to Hill & Denio (N. Y.) 410.

ALBRECHT v. LONG, in Minn. Sup. Ct., July 2, 1878—25 Minn. 163.

Action by Ernest Albrecht *et al.* against Seth W. Long *et al.* on official bond. From judgment for defendants plaintiffs appeal.

GILFILLAN, C. J. The defendant Long was sheriff of the county of Waseca, and Stevenson was his deputy. Executions issued against the property of Sherwins were delivered as follows: One in favor of Charles Shedd, to the sheriff himself, at 10:30 o'clock p. m. of March 19, 1877; one in favor of Chancy Hardin *et al.*, and another in favor of J. S. Ricker *et al.*, to the sheriff in person, at 2 o'clock a. m. of March 20; and one in favor of these plaintiffs, to the deputy, at 6 o'clock a. m. of the same day. The deputy levied this last execution at half-past 6 a. m. of the same day, and took possession of the property. About half an hour thereafter, the sheriff levied the three executions delivered to him in person, upon the same property, and, upon his request, the deputy delivered to him the plaintiffs' execution, and the possession of the property. The sheriff advertised the property for sale under several executions, not naming either of them, and sold the property, and applied the proceeds, after deducting his fees, to the payment in full of the Shedd execution, and the remainder upon the execution of Hardin *et al.*, and returned the plaintiffs' wholly unsatisfied, whereupon plaintiffs bring suit against the sheriff and the sureties in his official bond.

The question presented is, whether the levy of an execution gives the execution creditor a lien upon the property, which entitles him to priority over other executions in the hands of the same officer against the same debtor, delivered to the officer before, but not levied till after, his? For these executions are all to be taken as delivered to the sheriff. The deputy is not an officer having a separate official existence from that of the sheriff. He is an officer of the sheriff's whose powers and duties, so far as they affect the public, it is true, are defined by law. But he holds the office at the pleasure of the sheriff, is appointed and removable by him, and civilly responsible to him, and not to the parties whose writs come into his hands. He must act in the name of the sheriff, and not in his own name. All his acts are, in law, the acts of the sheriff; and the responsibility, civilly, for such acts done [*171] within his authority, is that of the sheriff. Our statutes do not, as do the statutes of some of the states, alter in any way the *status* of the deputy.

It is the duty of the sheriff, upon a writ coming into his

hands, to use due diligence in the execution of it. It attaches to the writs as they come into his hands, and it follows that it is his duty to execute first those which are first delivered to him. Upon several executions in favor of different creditors against the same debtor, it is his duty to the creditor in the first delivered, to execute that first; and to the creditor in the second, to execute that second; and so through them all. This is the duty he owes to the several creditors. But the rights of the creditors, as against each other, are not necessarily controlled by it.

At the common law, an execution bound the goods of the debtor from the time of the *teste*, even though they were subsequently transferred to a *bona fide* purchaser. The statute 29 Charles II., c. 3, § 16, provided that execution "shall bind the property of the goods against which such writ of execution is sued out, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroner, to be executed." Under the common-law rule, the execution operated as a lien in favor of the creditor for the satisfaction of his debt, from the time of the *teste*, and, under the statute, it operated as a lien from the time of its delivery to be executed. And the latter would continue to be the rule, were it not for the provisions of the statute of this state. Gen. St. c. 66, § 269, enacts that "until a levy, property not subject to the lien of the judgment is not affected by the execution." So that the creditor acquires a lien on the property, by virtue of his execution, only from the levy. The property is not affected by the *teste*, nor the delivery to the sheriff. The levy fixes the rights of the creditor as to the specific property. It is argued that the statute 29 Charles II., and the General Statutes were passed only for the protection of *bona fide* purchasers, and therefore do not affect the rights of [*172] execution creditors as against each other. If this were so, their rights would be controlled by the common-law rule, that the execution binds the goods from its *teste*, and the execution last delivered and levied might take precedence of all the others, because of the priority in its *teste*. We do not think the statute was intended to operate only as between the execution creditor and a *bona fide* purchaser, as claimed, but it was intended to define absolutely, as its language indicates, the rights of the creditors as to the specific property, and as between him and all others.

The execution first levied, then, has the first lien on the property, though there may be others in the hands of the sheriff, which were delivered to him before the one levied. *Russell v. Lawton*, 14 Wis. 202 [*ante* p. 331]; *Knox v. Webster*, 18 Wis.

406 [*ante* p. 333]. The creditors in executions afterwards levied cannot claim to be paid out of the property, until the one first levied is satisfied. This would be so in a contest between the creditors, and it must be so in a dispute between the creditor having the first lien by levy, and the sheriff. The remedy of the creditor in the execution first delivered is against the sheriff. If the latter, through negligence, omit to levy the first execution till a second has been levied, and loss thereby accrues to the first execution creditor, an action will undoubtedly lie.

It does not follow, however, from the rule of law that a sheriff and his deputies are regarded as one officer, that where several executions against the same debtor are placed, some in the hands of the sheriff in person, and others in the hands of his deputy, and in consequence thereof, and without actual negligence of the sheriff or deputy holding the execution first delivered, a subsequent execution is first levied, that the sheriff is liable to the creditor in the first execution. When it comes to a question of diligence, the law recognizes the fact that the sheriff and his deputy are different persons, though in theory one officer. And as it does not require impossibilities, it regards the question of diligence in view of [*173] that fact, and of what may naturally happen in consequence of it. *Russell v. Lawton*, 14 Wis. 202 [*ante* p. 331]; *Whitney v. Butterfield*, 13 Cal. 335.

Order reversed, and new trial ordered.

An officer received an execution at 4 p. m. with request to execute it at once by taking a designated stock of goods in a store in a town five miles distant, accessible by street car, through railway, or horse and carriage, and at the same time was warned that the judgment debtor would soon assign and was believed to be at that time making out the papers. The sheriff promised to attend to it that night if he had to go himself. He missed the train that night by reason of a recent change in time of departure and decided to wait till the next day. He went on the train at 10 a. m. the next day, and found the store locked, an assignment having been made and filed between 11 and 12 a. m. that day. Afterward he returned the writ unsatisfied for want of goods and was held liable in an action by the creditor for a breach of official duty. *Guiterman Brothers v. Sharvey*, 46 Minn. 183, 24 Am. St. 218, 48 N. W. 780. Similar facts and decision in *People v. Colerick*, 67 Mich. 362, 34 N. W. 683.

In *Whitney v. Butterfield*, above cited, a sheriff was sued for failure to levy before 1 a. m. Monday, a writ of attachment handed him between 9 and 10 p. m. Sunday, by reason of which delay a later attachment was first levied by one of his deputies in favor of another creditor. The delay of an hour at midnight, after he could legally execute the writ, was not sufficient ground for action, it appearing that the sheriff had no notice of the other writ or warning that great haste was necessary. The court

discuss at length the degree of diligence required of such officers. Compare *Commonwealth v. Magee*, ante, p. 306, and *Russell v. Lawton*, ante, 331.

ALBRECHT v. LONG, in Minn. Sup. Ct., Aug. 4, 1880—27 Minn. 81, 6 N. W. 420.

After the next trial defendants appealed from judgment for plaintiffs.

GILFILLAN, C. J. * * * There was evidence of a previous arrangement between the sheriff and deputy to the effect that the latter should not serve any process issuing from the district court; that all such process should be served by the sheriff in person. Defendants claim that, had this arrangement been acted on, plaintiffs' [*83] execution would have come into the hands of the sheriff, personally, before service, and that he would have served the executions in their proper order; that the deputy was induced, by the attorney's false representations, to disregard the arrangement, and to receive, and at once, without consulting the sheriff, to levy plaintiff's execution. Such an arrangement, even if it might bind the sheriff and deputy, could be of no effect as to third persons. A deputy sheriff, it is true, is an officer of the sheriff, appointed and removable by him, civilly responsible to him, and acting only in his name. But the deputy's powers and duties, so far as the public are concerned, are fixed by law, and cannot be varied by any agreement between him and the sheriff. Those powers and duties are vested in and imposed on him, not for the convenience of the sheriff, but of the public. Notwithstanding the arrangement, therefore, it was the duty of the deputy to receive the execution, and with all reasonable diligence to execute it. That the deputy was, by false statements, induced to do his duty in receiving the execution, and to perform his duty to levy it at once, without delay, is not in law a fraud. Deceit, not followed by what the law recognizes as a wrong, is not fraud. * * *

Judgment affirmed.

LEDYARD v. JONES, in N. Y. Ct. of App., Dec. Term, 1852—7 N. Y. (3 Selden) 550.

Action by Ledyard against Jones as sheriff for failure to return an execution. From judgment for plaintiff defendant brings error.

WATSON, J. There is but a single point in this case which the court is called upon to decide, and that is, as to the amount of damages the respondent is entitled to recover in this action. The verdict finds that the appellant did not levy the execution placed in his hands: that he made a false return upon it: that he did not return it at the expiration of sixty days: and it was admitted on the trial that the defendant in the execution had both real and personal property out of which the execution might have been satisfied. The amount of the execution was \$500.49, and the jury found a verdict of \$200. This question has been repeatedly passed upon in the supreme court, and I regret that the decisions are conflicting. In *Patterson v. Westervelt*, 17 Wend. 543, where it was shown that the judgment debtor had abundant means to satisfy the execution, the court held, that the plaintiff sustained damages to the whole amount of the judgment; and that having been kept out of his money by the wrongful act of the officer in not executing and returning the process according to its commands, the debt as proved by the judgment constituted [*552] the true measure of damages. In the case of *The Bank of Rome v. Curtiss*, 1 Hill, 275, the court held that the sheriff was *prima facie* liable for the whole amount due, and that it was no answer to say that the defendants in *fi. fa.* were still able to pay. This doctrine was again laid down by the court in the case of *Pardee v. Robertson*, 6 Hill, 550, together with another upon which the appellant has made a point, and that is, that the respondent might recover the full amount of the judgment without averring special damages in his declaration. All these cases, as well as *Weld v. Bartlett*, 10 Mass. 470, 474, lay it down with this qualification, that the debt is *prima facie* the true measure of damages, the sheriff being at liberty to mitigate the amount by showing affirmatively that the whole sum could not have been collected if due diligence had been exercised in executing the process. In the case of *Stevens v. Rowe*, 3 Denio, 327, the court held an entirely different doctrine. They held that the plaintiff could not show that the judgment debtor had real estate out of which the *fi. fa.* might have been satisfied unless expressly averred in the declara-

tion, and also that the sheriff might mitigate the amount, not simply by showing his inability to collect the money, but by proof that the debt was still safe and collectable. I confess I am unable to see the justice of the rule laid down in the case of *Stevens v. Rowe*, and if it is good law, the statute which gives the plaintiff a right to recover damages against a sheriff who neglects to execute process delivered to him, is a mere nullity. It in truth affords him no remedy whatever, and allows an unfaithful and defaulting officer to take advantage of his own wrong, a privilege that the law accords to no other person. According to this construction, if the officer is sued for a neglect of duty, he can say the defendant in the execution had no property out of which he could collect the money, and that it is contended is a good defense, or he can say he has property out of which you can still collect it, and therefore nothing but nominal damages can be recovered against me, which can only be the damages the plaintiff has sustained by the delay in collecting the money, simply the [*553] interest upon the interest of the money due when it ought to have been collected. To such a doctrine I can never yield my assent, for a plaintiff, if this is tolerated, might never be able to collect his debt. The second execution issued upon the same judgment would admit of the same defense, and so on, as often as they might be issued, provided the judgment debtor did not in the meantime get rid of his property. The rule laid down by the court in the cases first cited, is by far the most salutary, and to my mind a just and fair exposition of the statute giving a remedy against defaulting officers. * * * [*554] * * * The judgment of the supreme court should be affirmed.

RUGGLES, Ch. J. and JEWETT, JOHNSON and WELLES, JJ., concurred in the opinion of Judge WATSON.

GARDINER and MORSE, JJ., dissented, but wrote no opinion.

Approved in *Dunphy v. Whipple*, 25 Mich. 10, holding sheriff liable for full amount for failure to return writ showing levy and sale to creditor.

See also *Chaffin v. Crutcher*, 2 Sneed (Tenn.) 360; *Taylor v. Hancock*, 19 La. An. 466. This is the better view. In the cases to the contrary, like *Colyer v. Higgins*, post, and *Commonwealth v. Magee*, ante, the question seems to be disposed of without much consideration and without being argued by counsel. In a later Pennsylvania case a constable was sued for releasing property levied on and judgment rendered against him for the amount of the execution, which the supreme court affirmed, saying: "The measure of damages is not always the amount of the execution but the value of the property levied on when it does not equal the amount claimed in the execution. This furnishes the true rule.

But the presumption here is that the value of the goods was at least equal to the amount claimed." *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 568. "What the sheriff could have made for the plaintiff, by a proper discharge of his duty, is the just and reasonable, as well as the legal, standard of his liability." *Commonwealth v. Contner*, 18 Pa. St. 439.

COLYER v. HIGGINS, in Ky. Ct. of App. Winter Term, 1863—62 Ky. (1 Duvall) 6, 85 Am. Dec. 601.

BULLETT, J. This is an action against Colyer, the sheriff of Rockcastle county, and his sureties, upon an official bond executed on the 3d of January, 1853, to recover the amount of an execution placed in his hands, and thirty per cent damages for his failure to return the same for thirty days after the return day thereof. A judgment was rendered accordingly against the defendants, from which they appeal.

In our opinion, the plaintiffs have not shown a right to maintain an action upon said bond.

The petition states, that in the year 1852, an execution in favor of the plaintiffs, against one Kietley, was placed in the hands of said Colyer, sheriff of said county, and was levied by him on some property; that afterward, on the 24th of November, 1852, a writ of *venditioni exponas* was issued thereon, returnable the fourth Monday of January, 1853, and "was also in its lifetime [*7] placed in the hands of said Colyer while sheriff as aforesaid;" and that he failed to return the same until the 25th of April, 1853.

Under the constitution of the state, the office of each sheriff expired on the first Monday in January, 1853, or as soon thereafter as his successor qualified. Art. 6, § 4. The facts before mentioned authorize the assumption that Colyer was elected and qualified for two terms, the first of which expired in January, 1853.

It does not distinctly appear, nor does it seem to be material, whether the writ of *venditioni exponas* was delivered to Colyer before or after the expiration of his first term. That writ gives no new authority to the sheriff. It merely commands him to perform his duty under the original writ. According to the settled principles of the common law, he who begins the execution of a writ of *feri facias* must end it. A sheriff who levies upon property may sell it after the return day and after returning the execution, without a writ of *venditioni exponas*, and after he has gone out of office; and it is his duty to do so. *Cox v. Joiner*, 4 Bibb (Ky.) 94; *Wolford v. Phelps*, 2 J. J. Marsh. (Ky.) 31;

Rogers v. Darnaby, 4 B. Mon. (Ky.) 238, 241; *Irwin v. Pickett*, 3 Bibb (Ky.) 343; *Lofland v. Ewing*, 5 Litt. 42; *Neilson v. Churchill*, 5 Dana (Ky.) 333; *Sprang v. Commonwealth*, 12 Pa. St. 358, and cases cited. And if he sells property he must convey it, though he may have gone out of office. *Allen v. Trimble*, 4 Bibb, 21; *Trimble v. Breckenridge*, Ib., 479. These principles, so far as they apply to the question under consideration, do not appear to have been changed by statute.

It is clear, therefore, that if Colyer had gone out of office on the first Monday in January, 1853, it would have been his duty to execute the writ of *venditioni exponas*, whether it came to his hands before or after the expiration of his term; and that his sureties (for his first term) would have been liable for his failure to do so. It is equally clear, that if he had gone into office, for the first time, in January, 1853, it would have been the duty of his predecessor, and not his duty, to execute the writ; and that his sureties in the bond sued upon would not have been liable for his failure to do so. It is evident, therefore, [*8] that the duty of executing said writ was devolved upon him by his first, and not by his second term of office; and that the bond sued upon, which relates only to his second term, did not bind either him or his sureties for the performance of that duty, which appertained to his first term.

But the appellees have a right, independently of the bond, to recover nominal damages from Colyer for failing to return the writ as required by law; and this is the only relief to which their petition shows they are entitled.

Upon other points argued by counsel we need not express an opinion. The judgment is reversed, and the cause remanded, with directions to dismiss the petition against the sureties, and for further proceedings against Colyer not inconsistent with this opinion.

Reversed.

In Minnesota it is said that execution against property attached should be given to and executed by the successor, if the old sheriff had gone out of office. *Butler v. White*, 25 Minn. 432.

HARTLEIB v. McLANE, in Pa. Sup. Ct., May 6, 1863—44 Pa. St. 510, 84 Am. Dec. 464.

Case by Mathias Hartleib against John W. McLane as sheriff of Erie county for value of goods levied on under plaintiff's *fi. fa.* and stolen between the day of levy and the day of sale out of a store in which the goods were seized, and of which the

sheriff had kept possession. From judgment for defendant plaintiff brings error.

THOMPSON, J. There is but a single point of inquiry in this case; that involves the question how far a sheriff is liable for the safe custody of goods taken in execution by him, and the degree of care to be observed, whether of an ordinary bailee for hire, or a common carrier or innkeeper, so as to raise a responsibility for loss by theft. * * * [*512] In *Wheeler v. Hambricht*, 9 S. & R. (Pa.) 390, although the action was for an escape, yet the reason for liability was rested upon general principles of public policy. There the sheriff had made a return of *non est inventus* to a *ca. sa.*, but before the return his deputy had arrested the defendant on another writ. Under these circumstances the sheriff was holden as for an escape on the first writ. * * *

Why should a sheriff, having in custody the person of a defendant as a satisfaction of the judgment on which his writ is founded, on principle, stand on different footing from that on which he would if he had the custody of the defendant's property for the same purpose? It is not easy to see the distinction, and a more difficult task would be to point out where the argument, good in the one case, is defective in the other. The proposition is, that authority settles, that ordinary care is not sufficient in the one case; but inasmuch as direct authority does not exist either way, ordinary care is sufficient in the other. This is not a *non sequitur*. It seems to me to be more reasonable to apply the strict rule to the custody of goods than to the person; for if they be stolen the creditor cannot levy again, and he must bear the loss without the slightest default of his own; whereas, for an escape, if it is the defendant's own act, he may be again arrested. In the one case the debt is absolutely satisfied by the levy, in the other it is only contingently so. * * * [*513] * * *

The sheriff, when he levies, is armed with authority to become the exclusive custodian of the property seized, and it is his duty to become so in fact, if he would not risk its abstraction. This care is his personal interest, if the law requires him to account for the property, unless he is divested of it by the act of God, the public enemies, the law, or by some irresistible accident, such as sudden fires, or the like. Nothing but such a rule we think adequate for such a trust, and we believe the stringency of the law in Pennsylvania in regard to sheriffs, has so much increased the care of incumbents of the office in the discharge of their duties, that it accounts for the fact that we have but few cases, comparatively speaking, against sheriffs for deficiency in

the discharge of their official functions. The opinion of jurors of what is due care and diligence, although in many cases it is necessarily a standard of liability, is at best a loose one, especially in regard to officers of influence, such as sheriffs. It would be found to be too flexible for exact justice. Through sympathy for the officer the debtor and creditor would be liable to be forgotten. It is infinitely better, therefore, to contract the necessity for a resort to vague standards than to enlarge it. We shall doubtless find no lack of good and efficient men ready and willing at all times to risk the responsibility of the rule for the sake of the office.

An objection is sometimes urged that the officer is allowed no fees for watchmen, or for the removal of goods. This is doubtless because the law-making power has supposed that the taxable costs for executing process, and in making sales, are sufficient for this purpose. If they are not, the law should be altered; for it would be a bad system that would take away the control of the debtor over his property, which may not, before sale, go into the hands of the creditor for preservation, and yet leave it liable to be stolen or embezzled while in the custody of the sheriff. [*514]

In *Watson on Sheriffs*, 188, the rule of the English authorities in regard to the liability of sheriffs in executing mesne process, is thus stated: "After the sheriff has seized goods, it is his duty to remove them to a place of safe custody until they can be sold, for if they be rescued, the sheriff is liable to the plaintiff for their value; *Sly v. Finch*, Cro. Jac. 514, Godbolt 276; *Mildmay v. Smith*, 3 Saunders (Eng.) 343; and it is said that if the sheriff take cattle, and afterwards the cattle die for want of meat, the sheriff is answerable for the value returned." *Clerk v. Withers*, 2 Lord Raym. 1075. The rule of the common law undoubtedly was, and is, that the sheriff is liable for goods seized on final process, unless prevented by inevitable accident or public enemies. The authorities above cited prove this beyond doubt. See also as to this the opinion of Mr. Justice Redfield, *Bridges v. Perry*, 14 Vt. 262.

The rule of the common law is maintained by this learned judge in the case cited, and the learned counsel for the defendant in error were led into error in citing it as sustaining their theory of the case, in not adverting to the distinction drawn between an *attachment*, the object of which is to compel appearance, and an *execution*. In the former, the sheriff is held to occupy only the position of an ordinary bailee. The reason for the distinction seems to be not only in the effect between debtor and creditor as to satisfaction, but the delay before final process to dispose of the

property, sometimes extending to several years, and usually continuing for at least a year, until the case is finally tried. To hold the sheriff to the strictness of the common law rule on the subject of final process to cases of attachment, would, in the opinion of this able judge, be unreasonable; but he adds, "where property is taken on final process, it is to be kept but a short time at longest, so that it may be closely watched and kept with this severe diligence for a few days without materially interfering with the duties of the sheriff." Where attachment process is used for different purposes, sometimes as final, and at others as mesne process, as it is in several of the New England states, errors on this point may easily be made as to what is the judgment of their courts, without carefully noticing the exact nature of the process adverted to. There is a distinction, well defined, I think, between the two kinds of process. It was drawn directly from the common law distinction between custody on a *capias ad respondendum* and a *capias ad satisfaciendum*. In the former it is said that the sheriff may return a rescue; *Mildmay v. Smith*, 3 Saunders (Eng.) 343, and note; *Clerk v. Withers*, 2 Lord Raym. 1075; *O'Neil v. Marson*, 5 Burr. 2813; which he may not do in the latter. See authorities for it above cited; see, also, as to the rule of liability: *Sanford v. Boring*, 12 Cal. 539; *Collins v. Terrell*, 2 S. & M. (Miss.) 383; *Abercrombie v. Marshall*, 2 Bay (S. C.) 90. [*515]

A case much relied on by the counsel on both sides, is *Browning v. Hanford*, first reported in 5 Hill (N. Y.) 588, afterwards in 7 Id. 120, and finally in 5 Denio 586. The point of that case was, whether a sheriff's return of a loss of goods by fire was evidence in his own favor. It seems to have been held that it was not. Various judges and senators expressed their views, in that case, on the extent of a sheriff's liability; all agreeing that for an unavoidable accident, such as a sudden fire, he was not liable, and a majority seeming to hold that he was only answerable for the absence of ordinary care and diligence in regard to property taken on final process. A distinction is made between the bailee or receptor of the sheriff, as he is called, and the sheriff when he retains the custody of goods. In the former, that nothing short of the act of God, public enemies, or inevitable accident, will excuse the non-delivery of the property, while in the latter case, a loss, after ordinary care and diligence bestowed, is not to be visited with liability. The distinction seems hardly reasonable, and not quite logical. It was said, by some of the judges in that case, that the distinction grew out of the form of the receipt, which is an agreement without exception to deliver,

while others say it is a general principle of law. If the liability grows out of the contract, resulting from its terms, then it does not affect any question or principle of law on the subject. But if it result from legal principles, I cannot comprehend why there should be any difference between the sheriff when he is bailee, and when his receptor is bailee; why utmost care will not excuse in the one case, and less than that will in the other. We feel no disposition to adopt the uncertain theories of this case, and abandon the salutary rule of the common law, which, although there has been but little reported judicial discussion of the question, has, I think, always among the profession been supposed to be the law of this state. I have no doubt, as was said in the case just referred to, that casualties such as sudden fires would and ought to be classed with inevitable accidents, and excuse the sheriff. * * *

Judgment reversed, and venire de novo awarded.

To the same effect see *Gilmore v. Moore*, 30 Ga. 628; *Collins v. Terrall*, 2 S. & M. (Miss.) 383. In *Runlett v. Bell*, 5 N. H. 433, a sheriff was held not liable to the attaching creditor for property deposited with persons at the time solvent, who afterward converted the property claiming to own it and then became insolvent, but stress was laid on the fact that the creditor had sued them in the name of the officer for the conversion, which was said to be adopting the officer's act. But see *Garrett v. Hamblin*, 11 S. & M. (Miss.) 219, and *Phillips v. Lamar*, 27 Ga. 228, in which last case the bank where the sheriff deposited the money failed and he was held liable.

Only ordinary care is ever required of officers holding property under attachments, and in the following cases this was made the measure of liability under executions: *Cresswell v. Burt*, 61 Iowa 590, 16 N. W. 730; *State v. Nelson*, 1 Ind. 522; *Moore v. Westervelt*, 27 N. Y. 234; *Lambreth v. Joffrion*, 41 La. An. 749, 6 South. 558.

In an attachment case the Michigan court said ordinary care is all that is ever required. *Standard Wine Co. v. Chipman*, 135 Mich. 273, 97 N. W. 679.

Right to Compel Return of Exact Facts.

FLYNN v. KALAMAZOO CIRCUIT JUDGE, in Mich. Sup. Ct., Nov. 9th, 1904—138 Mich. 126, 101 N. W. 222, 4 A. & E. Ann. Cas. 1167.

Mandamus proceedings by Lawrence Flynn against the Kalamazoo circuit judge.

HOOKE, J. A judgment having been rendered against the relator in the circuit court for the county of Kalamazoo, an exe-

cution was issued. The sheriff returned that he levied the same upon real estate belonging to the execution debtor, had it appraised under the law pertaining to homesteads, and sold it at public auction for \$2,300. Relator claimed that this was a false return, and, on a motion to vacate the sale, sought to contradict the return. [*127] This court held that this motion could not prevail in the face of the return standing of record in the case, and it was intimated that a proper practice would be to obtain an amendment of the return. See *Flynn v. Circuit Judge*, 136 Mich. 23, 98 N. W. 740. Thereupon the relator filed a motion for an amended return, which was denied by the circuit judge upon the ground that an amendment to a return as to a matter of fact must be made voluntarily, and could not be compelled.

The following cases cited by the respondent's counsel seem to sustain the decision: In the case of *Sawyer v. Curtis*, 2 Ashm. 127, decided in 1830, it was held that "where the sheriff had returned his writ 'Executed,' and he does not ask permission to alter or modify his return, the court has no power to do it, and cannot compel him to make any alteration in it as to matter of fact; and the sheriff is responsible for a false return to the party injured." In *Humphries v. Lawson*, 7 Ark. 341, it was held that "the circuit court cannot compel a sheriff to amend his return to a writ, nor to return any particular state of facts. He has the privilege of amending, and is responsible for a false return." See, also, *Boas v. Updegrove*, 5 Pa. 516, 47 Am. Dec. 425. In *Hewell v. Lane*, 53 Cal. 217, the court said: "We are satisfied, however, that the sheriff cannot be compelled in this manner to contradict his return. He cannot, it is well settled, be compelled by the court to correct his return on file against his will." In *Wilcox v. Moudy*, 89 Ind. 232, it was said that "a sheriff's return to a writ is made on his official responsibility, and he only can afterwards amend it, but it must be on leave. The court cannot compel him to correct." In *Washington Mill Co. v. Kinnear*, 1 Wash. T. 101, it was held: "If the return be defective, he may be compelled to perfect it; but, if the record shows the return to be complete [*128] and perfect, the party who desires to traverse it is required to bring his action against the sheriff, who, on a proper showing, may be compelled to respond in damages for any injury resulting from a false return. It is said in *Clark v. Lyman*, 10 Pick. 47: 'The sheriff and his deputies have great and confidential powers intrusted to them. Their returns on writs and precepts are received as true, and are not to be controverted, except in an action for a

false return, and then the falsity must be proved.' And in 2 Ashmead, *Sawyer v. Curtis*, page 127: 'When the sheriff has returned his writ executed, and he does not ask permission to alter or modify his return, the court has no power to do it, and cannot compel him to make any alteration in it as to matter of fact. The sheriff is responsible for a false return to the party injured.' To the same effect, *McBee v. State*, 1 Meigs, 122; *Mentz v. Hamman*, 5 Whart. 105, 34 Am. Dec. 546; *Sample v. Coulson*, 9 Watts & S. 62." See, also, note to case of *Malone v. Samuel*, 13 Am. Dec. 173, and authorities there cited. In *Smith v. Gaines*, 93 U. S. 343, 23 L. Ed. 901, the federal Supreme Court said: "As regards the effort to compel the marshal to amend his return, we think his answer contains a reply which is conclusive. In making that return he acts under a heavy official responsibility. If false, he is liable to plaintiff and to defendant for any damages resulting from it. He must therefore be at liberty to make his own return, subject to that responsibility. Nor do we think his return can be questioned by the sureties. It is declared by the law to be the appropriate evidence of the right to proceed against them. It is an official act. If they had desired him to exercise it otherwise than he did, they might, by showing him property, have possibly rendered him liable for a false return, and, by paying the debt, avail themselves of this liability. But we do not think that either the spirit of the statute or the justice of the case permits as inquiry into the truth of the officer's return in the subsequent proceeding against the sureties. It is analogous to the return of *nulla bona*, as the foundation of a creditor's bill in chancery, which cannot be questioned." [*129]

Counsel for relator cites several cases said to support his contention, but the most of them fall short of it. See *Stetson v. Freeman*, 35 Kan. 530, 11 Pac. 431; *Boyer v. Lincoln*, 3 Ky. Law Rep. 537. In *Davis v. Weyburn*, 1 How. Prac. 152, it was held that a sheriff could be compelled to perfect an incomplete return. The same was held in *Berry v. Griffith*, 2 Har. & G. 343, 18 Am. Dec. 309.

Counsel for relator asserts that our former holding was, in effect, a decision that an amendment may be compelled, but we think it contains no such implication. It held merely that without an amendment the relief sought could not be granted.

The writ must be denied. The other justices concurred.

Who May Execute the Writ.

McMILLAN v. ROWE, in Neb. Sup. Ct., May 28, 1884—15 Neb. 520, 19 N. W. 504.

COBB, C. J. This was an action of trespass *de bonis asportatis* by William S. Rowe, plaintiff, against George McMillan, Curtis Hull, Gibson Keith, and Chris. Kochler, defendants.

It seems that Rowe, the plaintiff, was the owner of a quantity of barley; that McMillan and Hull had a judgment against said Rowe rendered by one Vandervoort, a justice of the peace; that the defendant, Gibson Keith, assuming to act as a constable, with the execution issued by said justice Vandervoort upon the said judgment in his hands, seized and took as upon execution the said barley of the defendant, advertised and sold it as upon said execution, and that the same was bought, taken, and converted to his own use by the defendant Chris. Kochler. This was the cause of action stated in the petition. * * * [*521] Upon the trial to a jury, a verdict was found for the plaintiff and against all the defendants for \$118.98. * * *

The only points made by plaintiffs in error in their brief are: *First*, The judgment creditors, McMillan and Hull, are not responsible for anything done by Keith, even if he was a trespasser, as he acted without their request or knowledge. A thorough examination of the bill of exceptions fails to show that these defendants, McMillan and Hull, or either of them, or any attorney claiming to act for them, had anything whatever to do with the issuing of the execution, its service, or return, nor is there any evidence that they received the money made thereon. Had there been such evidence, as one member of the court, I should be of the opinion that such receipts would render them responsible for the acts of Keith in taking the barley upon this execution; but there being no such evidence, the verdict as to them is not sustained. *The other point is*, that the statute directing how a justice of the peace may appoint [*523] a special constable is not the exclusive mode; the power existed at common law, and the issuing and delivery of the execution were sufficient. We cannot agree to this proposition. The authorities cited fail to sustain it. I do not think that there exists at common law any authority in a justice of the peace to appoint a constable to serve civil process. That such authority existed to appoint special constables to serve criminal process in certain cases is admitted. In

this case there is no evidence of the appointment of Keith as constable to serve the execution either verbally or in writing; indeed, it would seem very clear from the testimony of Vandervoort, the justice who issued the execution, that he understood Keith to be a constable, and that no appointment was desired or necessary. The provision of the statute of this state on the subject of deputizing persons by justice of the peace to serve process is as follows:

"A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age and not interested in the action to serve a summons or execution with or without an order to arrest the defendant or to attach property; such deputation must be in writing on the process." Code, § 1094.

This statute is, in my opinion, exclusive of any other method of appointing persons to act as special constables in the service of civil process. Its provisions not having been followed, it is no protection to either Keith or Kochler—to the one in seizing and selling the barley in question, or to the other in buying it at the sale. The judgment of the district court as to the defendants McMillan and Hull is reversed, but without costs; and as to the defendants Keith and Kochler, the said judgment is affirmed.

Judgment accordingly.

Release of attached property on motion by defendant because the statute required all writs directed to the sheriff, and this writ was directed to and levied by a constable, was affirmed, the court saying: "Whether Cronicle (who made the levy) might have been appointed to levy the writ in the absence of the marshal and sheriff, will not be profitable to consider, as this was not done." *Freeman v. Lind*, 112 Iowa 39, 83 N. W. 800.

Sale in absence of the constable by an auctioneer to whom the constable had delivered the writ with orders to sell was held void, because the writ did not, and the constable could not, authorize him so to act. *Stacy v. Bernard*, 20 Colo. App. 293, 78 Pac. 615.

In a trial between plaintiff relying on a purchase under a *fi. fa.* in his favor, and a claimant of the property, plaintiff offered in evidence the *fi. fa.* with the endorsement thereon. The evidence was objected to "because said entry on said *fi. fa.* was made by another [than the officer] and he could not delegate his authority to a private person." The court said: "It appears from the evidence in this case that the entry on the *fi. fa.* was written out by Greer in the presence of, and by the direction of Hawkins, the levying officer, who was unable to write, and that the officer signed said entry with his mark after the entry was made by Greer. A levy is required to be entered on the process by virtue of which the levy is made, but we do not regard it as necessary that it should be in the handwriting of the officer." *Cox v. Montford*, 66 Ga. 62.

Unless given by statute, the sheriff has no more power to serve process beyond his county than a person without office. When a sheriff levied on and sold a railway running through his county into another and a bill was filed by the purchaser seeking to redeem from a mortgage on the property, the court held that the complainant had no title because the property was sold entire and the sheriff had no authority beyond the borders of his county. *Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285. Compare *Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615, 38 Am. St. Rep. 231.

WALES v. CLARK, in Conn. Sup. Ct. of Errors, Nov. Term, 1875—
43 Conn. 183.

Assumpsit in superior court of New Haven. Defendant pleads to the jurisdiction that there was no personal service and that the only service was by a deputy sheriff filing a certificate of levy upon lands when he had not and never had any original writ, and that he did not receive any such writ till the day after the certificate was filed. Plaintiff demurred, and the court reserved the question for the advice of this court. When the deputy filed the levy, he had a telegram requesting him to do so, and stating that the writ had been mailed to him.

CARPENTER, J. The question in this case is one of jurisdiction. Both parties are non-residents, and no personal service was made on the defendant. In such cases the *situs* of the property attached determines the jurisdiction.

Was there an attachment? Or, stating the question in another form, can an officer make a valid attachment of real [*186] estate, before the precept, by virtue of which the attachment is made, is placed in his hands? The statute is as follows: "Real estate shall be attached by the officer's lodging with the town clerk of the town in which the land is situated, a certificate that he has made such attachment, * * * and said attachment, if completed as hereinafter provided, shall be considered as made when such certificate is so lodged." The remainder of the section prescribes the substance of this certificate, and provides that the officer shall, within four days thereafter, leave with such town clerk a full and certified copy of the process under which the attachment was made. Gen. Statutes, 1866, p. 4, § 17.

This statute was passed in 1855; and the lodging of a certificate is a substitute for the old mode of attachment, which was by an entry on the land. The officer who had a writ of attachment to serve went upon the land and that constituted the attachment. The attachment is now made by lodging with the town clerk a certificate, and it is expressly provided that the attach-

ment takes effect when the certificate is so lodged. Under the old statute, an entry without a process was clearly ineffectual; under the present, the lodging of a certificate before the process is received is equally invalid.

The power and duty of an officer depend upon his possession of the process. The latter may be qualified, or the officer may be relieved of it altogether, by instructions; but it exists only while the power exists, and both come into existence when the process is placed in his hands. Until then he has no authority to act, and cannot be justified in interfering with the persons or property of others.

It will hardly be pretended that an officer will be justified in making an arrest in a civil suit before he receives a precept commanding him to do it; nor can he take personal property in anticipation of a writ of attachment. In such cases he must be prepared, if his right is challenged, to produce his authority. If he cannot do it he is a trespasser and may be resisted as such.

The land in New Haven county was not otherwise attached than by the officer's lodging with the town clerk the required [*187] certificate on the day before he received the writ. It follows that there was no valid attachment, and the superior court must be advised that it has no jurisdiction of the case.

"This is a plain case. Without a writ of attachment, the sheriff of Story county had no authority or right to notify the appellant that he was attached as garnishee, nor to take his answers to the interrogatories. * * * The district court has no more power to render a judgment upon a notice given and answers thus taken and returned than if the same thing had been done by a justice of the peace, notary public, a road supervisor, or a private individual." Judgment against the garnishee reversed. *Van Fossen v. Anderson*, 8 Iowa 251.

HEYER & CO. v. MOODY & CO., in Texas Sup. Ct., April 12, 1887—
67 Tex. 615, 4 S. W. 242.

WILLIE, C. J. On Nov. 15, 1881, Oliver & Griggs sued out a writ of attachment against Bessling & Roller, which was on the same day levied by T. E. Jackson, sheriff of Limestone county, upon a stock of goods in Groesbeck, and on the next day upon a stock of goods in Mexia. After levying upon the Mexia stock the sheriff returned to Groesbeck, leaving that stock in the storehouse in which it was contained, and its key in charge of three persons, with instructions to close the doors and make an inventory of the goods.

Before leaving Mexia the sheriff was told that other attachments [*617] would soon be there, to which he replied that J. M. Waller (who was a constable and also Jackson's deputy) could serve any process that could be served by the sheriff. After Jackson had left, a writ of attachment in favor of Gust Heye & Co. against Bessling & Roller was placed in the hands of Waller, who levied the same on the stock of goods in Mexia. Waller's return showed that the writ was levied by him upon said stock on November 16, at eleven o'clock, as per inventory filed, subject to the levy of the attachment of Oliver & Griggs, and it was signed, "T. E. Jackson, sheriff of Limestone county. J. M. Waller, deputy." On the nineteenth, Waller delivered the attachment to the sheriff, who filed it with the papers of the cause. Jackson reached Groesbeck on the sixteenth, and an attachment in favor of W. L. Moody was on the same day placed in his hands for levy. His return upon this writ showed that he levied it upon the Groesbeck stock at one o'clock p. m., and on the Mexia stock at half past two o'clock p. m., of that day, subject to the Oliver & Griggs attachment.

All of the attaching creditors obtained regular judgments upon their claims at the same term of the court. The sheriff sold the two stocks under order of court, and, after paying off the judgment of Oliver & Griggs, returned the balance of the proceeds of the sale, viz., eighteen hundred dollars, into court; and the present action tests the question as to whether this money shall be paid to Gust Heye & Co., or to W. L. Moody & Co.

The court below held that the goods, when levied upon under the attachment in favor of Oliver & Griggs, were *in custodia legis*, and could not be attached by another officer, though a deputy of the officer by whom the first levy was made; that the sheriff in possession alone could make such a levy; that the acts of the deputy were not by construction the acts of the sheriff, unless adopted and ratified by him, and that there was no such ratification. Upon this view of the law, judgment was rendered for W. L. Moody & Co., and this appeal is taken by the appellant from that judgment.

It is a general principle that goods attached by one officer and in his possession, can not be attached by another officer. The question whether it was rightly applied by the court below in the present case depends upon whether the sheriff and his deputy were different officers. Our statutes provide that sheriffs shall have power, by writing, to appoint one or more deputies, who

shall have power and authority to perform all the acts and duties [*618] required of their principals. Rev. Stat., Art. 4520. All writs, including attachments, are directed to the sheriff or any constable, but may be executed by a deputy sheriff, who makes his return in the name of his principal. So far as the public is concerned there is no difference between the powers and duties of the sheriff and his deputy; either can perform and can be compelled to perform the same acts that are required of the other. When a writ reaches the hands of a deputy it is in fact received by the principal. He is liable for its proper enforcement, and for all acts done by his deputy under its authority. If goods are tortiously seized under it by the deputy, the principal can be sued by the owner; if they are illegally disposed of by the deputy, the principal is responsible.

As between the sheriff and the deputy, of course the former can make the latter responsible for such losses or misconduct, but with this the public has no concern. It follows that as to the public, whose servants these officers are, the acts of the deputy are the acts of the principal—the possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy; so far as its rights and duties are concerned they are in every respect identical. This is not only the true construction of our statute, but is clearly the rule at common law. Bacon's Abridgment, title Sheriff; Comyn's Digest, title Officer; Gwynne on Sheriffs, 43; Murfree on Sheriffs, § 18.

The acts of the deputy are performed in the name of the principal, and they become so essentially the acts of the latter that he may lawfully return that they were done by himself. Freeman on Executions, § 384. From these principles we can but conclude that the act of Waller in making the levy upon the Mexia stock of goods was the act of the sheriff and amounted to the same thing as if he had made the levy himself. As the goods were in the possession of the sheriff under a former attachment, it was of course proper for him to levy the subsequent writ of Gust Heye & Co. upon it, subject to the previous levy of Oliver & Griggs.

We are cited to no authorities by the appellee which sustain the ruling of the court below, that the sheriff and his deputies are different officers and that the possession of attached goods by the one is not the possession of the other. In the case of *Vinton v. Bradford*, 13 Mass. 116, 7 Am. Dec. 119, it was held

that [*619] the deputies of the same sheriff are different officers as to each other; but it had been held by the same court in *Watson v. Todd*, 5 Mass. 273, that the possession of a deputy was the possession of the sheriff. This doctrine of the last named case was sanctioned by the former, and it was added that the possession of the deputy being the possession of the sheriff the latter could levy a second writ upon goods attached by the deputy, the same being constructively in the possession of the sheriff.

If the possession of the deputy is the possession of the principal, it is because they are, in the eye of the law, identical in so far as the duties of the office of sheriff are concerned. If so, the acts of the former are the acts of the latter. Waller's levy of the attachment of Heye & Co. was therefore the levy of Jackson, and was under the authority of law made upon goods in the possession of Jackson. It is proper to add that the New England cases differ, as to the position which the sheriff and his deputies occupy towards the public, from the decisions of other states, probably on the ground that they are there treated in many respects as if they did not hold the same office. A deputy is liable directly to a party aggrieved by his misconduct; and he and the sheriff can not be sued as joint trespassers, and in at least one of these states process is directed both to the sheriff and his deputy. Murfree on Sheriffs, §§ 907, 938; *Odiorne v. Colley*, 2 N. H. 66.

To hold as the court below did in this case that a deputy can not levy upon goods already attached and in possession of the sheriff would be to deprive the public of the benefit of a deputy's services whenever a second attachment was to be levied. The goods already attached being in the possession of the sheriff, no matter whether levied by a deputy or not, could not afterwards be subjected to another levy, except by the sheriff himself. Deputies are appointed as well for the benefit of the public as of the principal sheriff, and their powers must not be so construed as to deprive the public of their services in any respect.

It may be added that in this case the sheriff ratified the act of his deputy in making the levy for Heye & Co., and adopted it as his own by filing his return as made among the papers of the cause.

We are of opinion, therefore, that Heye & Co.'s attachment having come to the hands of Waller, the deputy, prior to the time that Moody & Co.'s writ reached Jackson, the sheriff,

and having been levied upon the Mexia stock previous to the latter writ, was entitled to priority, out of the proceeds of the goods [*620]sold under the Oliver & Griggs attachment. This priority of levy upon the Mexia stock gave Heye & Co. the right to have its proceeds applied to their debt next after Oliver & Griggs were satisfied. Immediately upon the making of their levy they were entitled to require Oliver & Griggs to exhaust the Groesbeck stock, upon which there was no other writ levied, before levying upon the Mexia stock, upon which they held an attachment lien. This right was not changed by any subsequent levy upon the Groesbeck stock by Moody & Co. They could not, by acquiring a subsequent lien, impair or interfere in the least with the extent of the right of Heye & Co. to have their lien satisfied out of the Mexia stock. This would, however, be the result if the levy of appellees upon the Groesbeck stock is to affect the previous levy of the appellants upon that in Mexia. * * *

Reversed and remanded.

For What Garnishees May Be Charged.

FIRST NATIONAL BANK v. DAVENPORT & ST. PAUL RY. CO.,
in Iowa Sup. Ct., Dec. 11, 1876—45 Iowa 120.

Judgment being recovered by the First Nat. Bank against the Davenport & St. P. Ry. Co. and the Davenport Ry. Con. Co.. J. S. Conner was summoned as garnishee under an execution issued thereon. From an order discharging said garnishee plaintiff appeals.

DAY, J. * * * The answer of the garnishee shows that he was auditor and cashier of the operating department of the Davenport Railway Construction Company. As auditor he had charge of the accounts, examined agent's reports, and kept the books. As cashier it was his duty to examine and receipt for the cash remitted by the agents, to make collections from the roads, and to cause anything to be done necessary to the prompt and regular collection of the earnings of the road, and to make such disposition of the cash in hand as he was directed to make from time to time by the general manager, Smith. At the time of his garnishment he had on hand, of money so received, belonging to the operating department of the Davenport Railway Construction

Company, \$3,443. This money was kept in a safe provided by the construction company, to which the garnishee alone had a key. The garnishee claims that he is not liable because he did not have independent control of the money, but was under obligation to dispose of it as directed by his superiors. The position of appellee cannot be better expressed than in the following quotation from the argument of his counsel: "The fallacy of the plaintiff's argument consists in assuming that the garnishee had these moneys in his *possession and in his custody or under his control*, a fact which has not only not been proved, but the contrary most clearly and distinctly appears. The possession and *control* of property contemplated by the statute, does not mean the mere physical power to take possession of it and carry it off; but the independent possession—the present and immediate rightful custody of it, including the right to retain that possession, and to maintain that custody and control of it. [*128] The law does not require that the garnishee should commit a trespass, or a gross breach of faith, in order to obtain or retain possession of the attached property."

Appellee, in assuming that the possession which will warrant the process of garnishment must be an independent possession, coupled with the right to retain possession and maintain custody and control is, we think, clearly in error. Aside from express contract, one does not obtain such possession and control of the property of another. Suppose a party makes a simple deposit of money in a bank, without any agreement as to the time the deposit shall remain. The bank holds the money entirely subject to the control of the owner. It cannot rightfully hold the money an hour after the owner has directed it to be paid out. Yet it cannot be questioned that, while the money remains in the bank, the bank may be garnished. Suppose garnishment process served upon the bank, and that afterward the owner orders the money to be paid out in a particular way. Does the bank commit a breach of faith in holding the money, and refusing to dispose of it as directed by the owner?

The fallacy of the appellee's argument is in placing the duty of the garnishee to his principal above his duty to obey the mandate of the law. It may be conceded that the answer of the garnishee fully discloses that it was his duty to pay out the money in his possession as ordered by Smith; but the process of the court imposed upon him a paramount duty to retain it in his possession, and an obedience to that order would not render him a trespasser,

nor involve him in a breach of faith. We think appellee's counsel concede enough to establish the liability of this garnishee. In their argument they say: "We do not take the ground * * * that Conner cannot be held because he was an employé and not an officer of the corporation. An employe may clearly have such possession—such custody and control of the property of his employer as to subject it to garnishment in his hands. It depends altogether upon the nature of the employment. For instance, the agent of a railroad at one of its stations certainly has the unqualified and independent possession [*129] and control of the moneys of the company which came into his hands. He is only an employé; yet the nature of his employment and of his duties may, and probably would, render the moneys in his hands subject to garnishment. He has the independent possessions, control and custody of those moneys; while the cashier whom the company might employ to assist him in his work, by looking after and keeping accounts of those moneys, would not have any such possession and control of them."

Yet, these station agents are subordinate to the garnishee in this case, and are required to remit to him the moneys by them collected. Suppose such an agent had been garnished, and he had immediately been removed, and ordered to pay over all the moneys in his hands to Conner. could he afterward retain the money without a gross breach of faith? If he could, we are unable to see why the garnishee in this case may not do the same; and if he could not, it is apparent that a railway company may, at pleasure render the process of garnishment unavailing. We are satisfied that the appellee had such custody and control of the money in question as to render it subject to garnishment in his hands. He should have retained that possession, and held the money subject to the order of the court. In failing to do so he has magnified his duty to his employer, and has ignored his obligations to the law. The court should have held him liable upon his answer.

Reversed.

It is believed that the above decision announces the correct rule, and it is supported by the weight of authority. But in cases of this exact kind, decisions to the contrary will be found in Pennsylvania, Maine, Tennessee, Kentucky and Missouri. *Fowler v. Railway Co.*, 35 Pa. St. 22; *Sprague v. Steam Nav. Co.*, 52 Me. 592; *Wilder v. Shea*, 13 Bush (Ky) 128; *Mueth v. Schardin*, 4 Mo. App. 403.

The character of the conflict in the authorities will be seen by reading the following abstract from a decision reversing a judgment against a treasurer of a railroad company as garnishee of the company: "It is not every kind of holding that constitutes the possession designated, nor

every possibility of power over the property that gives the control necessary to make it garnishable. The servant who rides his master's horse to water, or keeps the keys of the stable, and has access to and power to take and use the horse, has not the garnishable possession and control, by reason merely of such custody and power. And so, too, the clerk in the store, who has access to the merchant's safe, and has charge and sale of the merchant's goods, and the power to receive and pay out money from the drawer or safe, has not, by reason merely of such charge and power, the garnishable possession and control of the merchandise and money. Such custody and power may exist with the clerk, and still, the merchandise and money not be in his possession and control in such wise as to make them the subject of garnishment in his hands. The custody and power must go beyond such occupation or holding and service, to constitute the garnishable possession and control. Where to draw the line and precisely to define the rule, is difficult and not safe to attempt—upon one side of which exists, and on the other side does not exist, the garnishable condition of the properties. It is safe, however, to say, that mere employment in the service of the owner, in and about his properties, and the physical power, by reason of such employment, to handle, remove, return such properties, to receive and pay out moneys of the owner, do not constitute the possession and control of the properties contemplated by the law of garnishment. Though such employment gives a degree of physical power over the properties, the possession and control exist with the owner, and not with the employé or servant. Of course such employment may exist, under circumstances with relation to the properties, as to invest the employé with such possession and control as to make them the subject of garnishment in his hands. It is obvious enough, that employment and possession of the garnishable character, may co-exist. But where the actual and substantial possession is with the owner, and the relation of the servant or employé to the properties is such only as is incident to the employment and service, the properties are not subject to garnishment as being in the possession or control of the servant or employé.

"The servant who feeds and waters and carries the master's horse, and keeps the key of the stable, the master having the actual and dominant possession and control; the clerk who opens and shuts the store, and sells the goods, and has charge of the keys of the money drawer and safe, subordinate to the actual possession and control of the merchant; the treasurer of the corporation, who has charge of the safe and the moneys therein, and receives and pays out under the immediate direction and control of the properties, as subjects them, the employees and properties, to garnishment. In such and the like cases, the question is, whether the actual and substantial possession is with the employee or whether his relation to the properties is merely of employment and service, while the real possession and control is with the owner or some other?" *McGraw v. Memphis & O. Ry. Co.*, [1868] 45 Tenn. (5 Coldwell) 434.

AVERY v. MONROE, in Mass. Sup. Jud. Ct. Oct. 20, 1898—172 Mass. 132, 51 N. E. 452, 70 Am. St. Rep. 250.

Trustee process. Trustee charged and excepts.

HOLMES, J. At the time of the service of the writ in this action the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about [*133] taking possession of the property. No creditors appear to have become parties to the deed. The question before us is whether these facts warranted the superior court in charging the trustee.

The title had passed as between the parties to the deed. The trustee had the right to the immediate possession. We do not see why he was not as well "able to turn it out, to be disposed of on execution," (*Andrews v. Ludlow*, 5 Pick. 28, 31) as if he had taken possession by formal act. The case of *Viall v. Bliss*, 9 Pick. 13, seems probably to have been similar to this, and in Maine it seems settled that in cases like the present the trustee is to be charged. *Lane v. Nowell*, 15 Maine 86; *Arnold v. Elwell*, 13 Maine 261; *Peabody v. Maguire*, 79 Maine 572, 584; *Glenn v. Boston & Sandwich Glass Co.*, 7 Md. 287. See also *Mechanics' Savings Bank v. Waite*, 150 Mass. 234, 235; *Cushing, Trustee Process*, §§ 53-55; *Drake Attachment*, (7th ed.) § 482; *Freeman, Executions*, (2d ed.) § 160. Section 26 of Pub. Sts. c. 183, is not intended to limit the liability of trustees under deeds like this to cases where they have taken possession, but simply to declare the existing law that they may be charged by trustee process under § 21; Rev. Sts. c. 109 § 35, Commissioners' note. We are of opinion that the property was "intrusted in the hands" of the trustee within Pub. Sts. c. 183 § 21.

It is suggested that it does not appear from the trustee's answers to interrogatories that all the defendants had executed the deed before service of the writ. It does not appear that they had not. The deed was executed, and, if it be material, may be presumed to have been executed by all three of the defendants on the day of its date, as it certainly was by two of them.

Exceptions overruled.

See opinion by Shaw, C.J., in *Osborne v. Jordan*, 3 Gray 277. *Avery v. Monroe* is the strongest case reported. There are several late cases tending in the same direction. See collection of all the principal cases in a review of *Avery v. Monroe* in *American Law Review* May-June, 1899.

SMITH v. MENOMINEE CIRCUIT JUDGE, in Mich. Sup. Ct., April 30, 1884—53 Mich. 560, 19 N. W. 184.

Mandamus by James D. Smith and another, against C. B. Grant, circuit judge.

COOLEY, C. J. On February 7, 1883, one Canterbury brought suit in the circuit court for the county of Menominee against one McClintock, and garnished the relators as having in their hands property of McClintock. Judgment was recovered in the principal suit, and the garnishees disclosed that they were in possession of certain goods and chattels of the estimated value of \$6,000, as mortgagees of McClintock, under a mortgage given to secure the payment of \$4775, all of which was due and unpaid. The garnishment suit appears to have been brought to trial before a jury, who returned a verdict that the garnishees had property of McClintock in their hands which was of the value of \$7,000, and had a lien upon it to the amount of \$4,772.69. Thereupon the circuit court made an order * * * [appointing a receiver of the property, directing the garnishees to surrender it to him, and directing him to sell the same at public auction, and apply the proceeds, (1) to paying the costs of the sale, etc., (2) to the payment of the garnishees' mortgage, and (3) to return the balance into court to apply on the judgment of the garnishing creditor].

The garnishees complain of this order, and apply in this proceeding for a writ of mandamus to require its vacation. Several objections are made to it, but only those will be noticed which appear to us to require examination for the purposes of a decision of the case now before us.

The statute (How. Stat. § 8064) contemplates that the court, when it shall appear that the garnishee has in his possession [*562] property belonging to the principal defendant, will appoint a commissioner or receiver to collect and apply the proceeds upon any execution in favor of the plaintiff and against the garnishee.
* * *

We have grave doubts of the right to take from a mortgagee of chattels the property upon which he has a lien, except where, for the protection of the rights of others, the necessity shall be apparent. It is a serious interference with his contract rights. It is a part of his security that the mortgage gives him authority to take the property into his own possession; and nothing which may subsequently be done by or against the mortgagor can rightfully diminish or affect this security. When a resort to legal

remedies becomes [*563] essential, all parties concerned may be required to submit to some inconvenience, and perhaps to some loss; but in a case where, as in this case, the legal remedy is only sought for the purpose of reaching a surplus after a lien is satisfied, and the lienholder is not concerned in the controversy, it cannot be rightful to make the burden or the cost of the litigation fall upon him, or to take from him substantial rights for the convenience of the parties litigant.

In this case the plaintiff, after obtaining his judgment, might have sold on execution the interest of the mortgagor in the goods and chattels mortgaged (How Stat. § 7682); and for the purposes of a levy might have taken possession temporarily. *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516; *Nelson v. Ferris*, 30 Mich. 497; *Haynes v. Leppig*, 40 Mich. 602. But the levy must be subordinate to the right of the mortgagee (*Worthington v. Hanna*, 23 Mich. 530); and a sale, if made without first paying off the mortgage, must be made of the goods in gross, subject to the mortgagee's lien. *Worthington v. Hanna, supra*; *King v. Hubbell*, 42 Mich. 597; *Haynes v. Leppig*, 40 Mich. 602; *Baldwin v. Talbot*, 46 Mich. 19; *Laing v. Perrott*, 48 Mich. 298. It is not apparent on this record that an execution would not have accomplished the purposes of effectual remedy quite as effectually as the appointment of a receiver; but if for any reason a receiver was deemed necessary, he could not properly be given greater powers than a sheriff would have had if execution had been placed in his hands. It would have been proper to empower him to examine the property and inventory it, for the purposes of an intelligent sale; but a sale must be made by him of the property in gross subject to the mortgage, and all his proceedings must be at the expense, not of the mortgagees, but of the fund that might be realized on the sale.

The order complained of should therefore be modified so far as it authorizes the receiver to displace the possession of the mortgagees, and so far as it authorizes the receiver to sell the mortgaged property without regard to the mortgage lien, and to pay the mortgagees from the proceeds after deducting [*564] expenses. The statute only contemplates a sale when a greater sum than the amount of the lien can be realized; and this is inconsistent with a sale in parcels, the outcome of which cannot be known when it is begun. And it is unjust, even if the statute would permit it, that the mortgagees should be subjected to the risks of a sale of all the property to be made by a receiver at the expense of

the fund, in a suit which concerns only other parties, when under their security they have a right to make sale themselves.

The order complained of does not require the receiver to give security. Probably this was an inadvertence. It should be corrected. An order will be entered in accordance with these views.

The other justices concurred.

WEBBER v. BOLTE, in Mich. Sup. Ct., June 20, 1883—51 Mich. 113, 16 N. W. 257.

Garnishment. Plaintiff brings error.

COOLEY, J. Two of the questions which were argued in [*114] this case seem to us to require no discussion, and we simply announce our conclusions.

1. The court should not have dismissed the case against the garnishees. The ground of the dismissal was delay in the proceedings. The case was begun September 16, 1881, and was being tried in December, 1882, when the trial judge on his own motion dismissed it, relying upon *Blake v. Hubbard*, 45 Mich. 1, for his authority. The defense raised no question of laches, and it is shown that jury trial had been demanded, and it could not have been tried at the preceding August term because no jury was summoned for that term.

2. The plaintiffs should have been allowed to amend the proceedings against the principal defendant so as to show his name by which he signed them, J. V. Consaul. The plaintiffs proposed to amend by substituting Jacob for J. No question of identity was made, and the amendment should have been permitted at any time when it was found important.

3. Upon the main question we think both parties have been laboring under some misapprehension. Consaul had contracted with defendants for the erection of a church building which was to be completed November 1, 1881. The contract price was \$8563. Payments were to be made as the work progressed, to the amount of ninety per cent of the estimates, and the balance after completion. A forfeiture was agreed upon in the event that the work was not done by the time stipulated. When the suit in garnishment was begun defendants had made large payments, and they insist that nothing was then due from them to Consaul. Plaintiffs dispute this, but they claim that whether that was so or not, they had a right to hold the defendants for anything that

might subsequently become owing to Consaul for work done by him under the contract. This claim is made under an amendment to the garnishment statute, which provides that the garnishee shall "be liable on any contingent right or claim against him in favor of the principal defendant." [*115] Public Acts 1879, p. 270. Consaul's right, it is said, was contingent on his performing his contract; so that the case is within the very words of the statute.

The case may seem to be within the words of the statute, but it is not within its intent or reason. To permit garnishment upon such claims would be a most unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights. It would be especially mischievous in the case of building contracts; for in a very large proportion of all cases of such contracts, the means for their fulfillment must be obtained from payments on the estimates; and if these can be garnished in advance, performance would be rendered impossible. This would be a great hardship to the debtor, but it would be quite as much so to his employer, who might have his arrangements broken up and serious injury inflicted without on his part any fault whatever.

No doubt the employer has a claim in such a case that the builder shall perform his contract; but the contingency on which money is to be payable is one depending on the subsequent earning of money. It is therefore a contingency depending on the will and ability of the debtor to earn money; a will which it may generally be assumed will not be exerted where earning is not to be followed by enjoyment. If there is a contingent claim here, so there is when a laborer hires out for a year to be paid at the end of the year; and his creditor may garnish the claim as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring after the claim was garnished.

Whatever, if anything, was due at the time the process was served in this case, the plaintiffs are entitled to reach. The ten per cent kept back as security for final performance might perhaps be considered a sum already contingently earned; but no question upon that can arise in this case, as it was conceded that Consaul did not complete his contract. The question of fact, then, is narrowed to this: whether the ninety per cent to which Consaul was entitled [*116] on the estimates, exceeded at the time this case was begun the amount which had been paid to him up to

that time. Upon that question the parties are entitled to produce their evidence.

The other justices concurred.

The judgment must be reversed with costs and a new trial ordered.

THOMPSON v. GAINESVILLE NATIONAL BANK, in Texas Sup. Ct., April 30, 1886—66 Texas 156, 18 S. W. 350.

Garnishment. Garnishee appeals.

WILLIE, C.J. The Gainesville National Bank obtained a judgment against A. J. Addington, and on June 20, 1885, had a writ of garnishment sued out thereon, and served upon the appellant, Thompson. On November 2, 1885, Thompson filed his answer denying any indebtedness to Addington, or having any effects of his in possession, either at the date of serving the writ or of making the answer. This answer was controverted by the bank on the ground that on July 12, 1884, Thompson executed a note to Addington, payable twelve months after date, and that this note at the time the writ was served was held as collateral by one Smith to secure a debt due to Smith from Addington. The terms of the note as stated in the contesting affidavit showed that it matured previous to the filing of the answer, though it was not due when the writ of garnishment was served.

The proof before the judge who tried the cause, without a jury, was conflicting in some important respects bearing upon the liability of the note to the garnishment proceeding. The judge subjected the note to the garnishment. In passing upon his judgment we must, in case of conflict of evidence, treat as true the testimony to which he must have given credence in making up his conclusions. The case before us, therefore, is that of a garnishee indebted to the judgment defendant upon a negotiable note, not due when the writ was served, but maturing before answer filed, and paid before that time, but after maturity, to the judgment defendant, he being at the time still owner of the note.

The law is well settled that the maker of an overdue note can be garnished for a debt due the owner. The note cannot be assigned to an innocent holder, free from such defenses as the maker could set up in a suit against him by the assignee. Garnishment at suit of the assignor's creditor would be a good defense, and hence the maker is fully protected when compelled by judgment to pay the amount of the note to the plaintiff in garnishment.

It seems settled, too, by the weight of authority that if the note is due and owned by the payee at the time judgment in garnishment is rendered, the maker is liable to such judgment, though, at the time he was served, the note had not matured. Drake on Attach., §§ 587, 588.

The authorities recognize the right to charge the maker after the note matures, provided, that at the date of serving the writ, the note [*158] was the property of the payee. *Bassett v. Garthwaite*, 22 Tex. 230, and other cases cited in note to § 623, Sayles' Treatise.

This is, in effect, to require the maker to answer as to his indebtedness upon a note not due, so that the plaintiff may charge him in garnishment by showing that it belonged to the defendant when service was made, and had since matured, and was still the property of the defendant. The law exempts the maker from a judgment in garnishment whilst the note is current, because he would not otherwise be protected by the judgment from his liability to the holder. But, if he is fully protected by the judgment, there is no reason why one should not be rendered against him, though the note was due when the writ was served.

Protection being secured to the maker, the reason of the law for not subjecting him to garnishment has ceased, and the plaintiff should be entitled to the benefit of his indebtedness to the defendant. He may not be able to secure this benefit without proceeding before the note became due. It is this that lays the foundation for a judgment after the maturity of the note, and to obtain this judgment he must be allowed to have an answer as to the condition of the indebtedness at the date of the service, to prove, if he can, that it was a debt upon a note, though negotiable and current, and that, at the time of service, the note belonged to the defendant.

This does not interfere with the maker's rights in the least, for, if the note thereafter and before maturity, has been assigned, the judgment cannot be rendered. The burden of proof is on the plaintiff to show that the payee has not transferred the note before maturity, otherwise the garnishee must be discharged. As to what effect a transfer after maturity would have, we need not now determine.

But the protection afforded the maker of the note is against a transfer by the payee to other parties. It is only in this event that he can be endangered by a judgment in garnishment. No other disposition of the instrument before judgment subjects him to a suit by any other person than the payee, and to a suit by

him the judgment in garnishment is a full defence. Against the maker's own collusion with the payee to defeat the plaintiff's right to the judgment, the law does not protect him.

If, as in this case, whilst the note is still owned by the payee, and overdue, and not liable to pass to an innocent holder, the maker settles it with the payee, there is no reason why he should be protected against a judgment in the garnishment proceedings. He has voluntarily paid a debt due from him to the defendant, which the latter could not have recovered. [*159]

After a judgment against the garnishee in favor of the plaintiff in garnishment, with full notice that the plaintiff had laid the foundation for such a judgment, he has paid the note, not for his own protection, but to enable the defendant to avoid the payment of a debt, which the plaintiff was entitled to enforce against him, and which he might have enforced, but for this collusion between the defendant and the garnishee.

It being perfectly apparent that none of the reasons why the maker of negotiable paper, current at the date of serving the writ of garnishment, should be exempt from the proceedings are applicable to the present case, and that neither the maker nor any innocent holder of the paper are in the least prejudiced by the garnishment, we are of opinion that the case presented was a proper one for a judgment against the garnishee.

The same conclusions have been reached in the courts of one other state, and we are pointed to no decisions to the contrary. *Leslie v. Merrill*, 58 Ala. 322. Whether the same rule would hold if the note had been paid before maturity we are not called upon to decide in the present appeal.

We are of opinion that the judgment below is correct.

Affirmed.

MOORE v. DAVIS, in Mich. Sup. Ct., June 10, 1885—57 Mich. 251, 23 N. W. 800.

Garnishment by Edward C. Moore against Alex. R. and Wm. F. Linn as debtors of the principal defendant, John C. Davis. The First National Bank of Madison, Indiana, intervened as claimant. From a judgment for plaintiff, claimant brings error.

The case was tried below before the court without a jury; and the court found as facts, that the garnishees confessed liability in the sum of \$139.65 for goods purchased, and that before the garnishment was served the claimant in the regular course of its

business, had received from Davis a draft for the amount with a copy of the account annexed and paid for same less the regular discount.

COOLEY, C.J. * * * The controversy, it will be seen, turns upon the question [*255] whether the draft by Davis on the Linns operated as an assignment of the demand. It was received and discounted by the claimant before the garnishment summons was served, and the Linns were notified of the facts before they answered. If, therefore, the draft transferred the demand to the bank, the judgment is erroneous.

In the recent case of *Gammel v. Carmer*, 55 Mich. 201, the question whether a draft was an assignment of the fund in the drawee's hands, to the extent of the sum drawn for, was considered and decided in the negative. That, however, was the case of a banker's draft, and it was not drawn for the whole fund in the drawee's hands. Many cases were cited in the opinion filed in that case, and the following, not then cited, are to the same effect: *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Lewis v. Traders' Bank*, 30 Minn. 134; *Jones v. Pacific Wood & Co.*, 13 Nev. 395; *Rosenthal v. Mastin Bank*, 17 Blatchf. 318, Fed. Cas. No. 12063; *Dolsen v. Brown*, 13 La. Ann. 551; *Sands v. Matthews*, 27 Ala. 399.

But this case differs from *Gammel v. Carmer* in the fact that the draft now in question was drawn for the exact amount of a sum claimed to be due from the drawees to the drawer for a bill of merchandise, and that the account was attached to the draft, evidently for the purpose of being sent forward with it. When thus sent forward, it would explain to the drawees the account on which it was drawn; but it must also have been understood to serve a further purpose, namely, to be evidence in the hands of the drawees that the account was paid when the draft was taken up by them. There could be no sufficient reason for attaching it at all, unless it was understood that the payment of the draft would be payment of the account as well.

By the general commercial law, as was said in *Gammel v. Carmer*, the purchaser of a draft is supposed to take it in reliance upon the responsibility of the drawer, and he has no other reliance until it is accepted. This is the general rule. But if the draft is for the whole amount of a fund, the draft may, in connection with other circumstances, tend to show an intent that it should operate as an assignment. First [*256] *Nat. Bank of Canton v. D. S. W. Ry. Co.*, 52 Iowa 378. And whereas, in this case, the draft is

for the amount of an account, and the account is attached, the purpose to assign appears on the papers themselves, and they need no support from collateral circumstances. The payee, then, in taking the draft has a right to understand that, in addition to the responsibility of the drawer, he has such security for payment as may be supplied by the account, and that he may collect the account for the satisfaction of the draft. The drawer, by the papers, in effect, says to the drawee: "This is my bill against you, which I have sold to the payee by this draft, and you are requested to make payment of it to him." This is what a business man would have a right to understand from them. The draft with the bill thus attached is not an ordinary bill of exchange, but it is an order that the debtor shall pay the amount of his debt to the person to whom it is delivered. The fact that the draft is negotiable in form is of no importance. It does not at all tend to rebut the evidence of intent on the part of the creditor to assign the demand.

The judgment must be reversed.

SCOTT v. ROHMAN, in Neb. Sup. Ct., Feb. 5, 1895—43 Neb. 618, 62 N. W. 46.

Bill in chancery in the Lancaster *district* court by Archie A. Scott against Charles Rohman and others, being all the interested persons, to determine the rights of the respective parties to money paid into said court by John Fitzgerald in satisfaction of the judgment theretofore rendered against him in said court in an action on account wherein John Lanham was plaintiff and said Fitzgerald defendant. From the decree of the court below complainant appeals.

Scott's claim is based on a garnishment in the *county* court of Lancaster against said Fitzgerald on a judgment in favor of said Scott against said Lanham on which an execution had been returned not satisfied. The garnishment was issued out of the county court and served after verdict returned against Fitzgerald in the district court in Lanham v. Fitzgerald, but before the judgment was entered. Upon garnishee's answer setting up these facts, and the entry of judgment in Lanham v. Fitzgerald, judgment was rendered against him ordering him to pay into said county court the amount of Scott's judgment, which was less than the amount of the judgment in Lanham v. Fitzgerald. Instead of doing so, the garnishee paid the whole sum into the district

court, and thereupon Scott filed this bill. Rohman claims as assignee of Lanham under an assignment executed after the garnishment was served.

NORVAL, C.J. * * * The record discloses that the indebtedness of Fitzgerald to Lanham had been reduced to judgment. The first question therefore presented is whether a judgment debtor can be garnished. Section 212 of the Code provides: "An order of attachment binds the property attached from the time of service, and the garnishee shall be liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the written notice." * * * [*628] * * * It is very evident that the foregoing provisions are sufficiently broad to cover debts reduced to judgment, and that a judgment debtor is liable to the process of garnishment in a suit against the judgment creditor. The statute is susceptible of no other reasonable construction. It does not exempt any credit of any kind whatever. The decided weight of the decisions in this country lays down the broad doctrine that a judgment debtor may be garnished, and we so hold the law to be in this state. *Osborn v. Cloud*, 23 Ia. 105; *Gamble v. Central R. & B. Co.*, 80 Ga. 595; *Wood v. Lake*, 13 Wis. 84; *Keith v. Harris*, 9 Kan. 387; *Skipper v. Foster*, 29 Ala. 330; 8 Am. & Eng. Ency. Law, 1169; Drake, Attachment (7th ed.), § 622.

The question presented by the record to be determined is whether a judgment debtor in the district court of this state is liable to garnishment proceedings issued out of the county court. There is an irreconcilable conflict in the authorities bearing upon the subject. Some decisions are to be found in the books which assert that a judgment debtor in one court may be garnished on process issued out of another court. *Luton v. Hoehn*, 72 Ill., 81; *Allen v. Watt*, 79 Ill. 284; *Jones v. New York & E. R. Co.*, 1 Grant's Cases (Pa.) 457; *Gager v. Watson*, 11 Conn. 168. The majority of the cases, and the more recent decisions, sustain [*629] the doctrine that a debt reduced to a judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise. Drake, Attachment, § 625; Waples, Attachment & Garnishment (1st ed.), 596; *Wallace v. McConnell*, 38 U. S. (13 Pet.) 136; *Thomas v. Wooldridge*, 2 Wood 667, Fed. Cas. No. 13,918; *Henry v. Gold Park Mining Co.*, 15 Fed. Rep. 649, 5 McCreary (U. S.) 70; *Franklin v. Ward*, 3 Mason (U. S.) 136; *American Bank v. Snow*, 9 R. I. 11; *Burrill v. Letson*, 2 Speers (S. Car.) 378; *American Bank v. Rollins*, 99

Mass. 313; *Perkins v. Guy*, 2 Mont. 15. In Drake, Attachment, § 625, it is said: "However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a state court so interfering with a judgment of a federal court, or *vice versa*; it is not to be supposed that, in either case, the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction." * * * [*630] * * * In Michigan it has been held that a judgment recovered before one justice of the peace is not subject to proceedings in garnishment before another justice. *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275; *Noyes v. Foster*, 48 Mich. 273; *Custer v. White*, 49 Mich. 462. It [*631] has likewise been decided that a judgment obtained in the circuit court of a state cannot be garnished before a justice of the peace. *Clodfelter v. Cox*, 33 Tenn. (1 Sneed) 330. To allow a judgment to be garnished in a court other than the one in which it was rendered would subject the debtor to a double judgment on a single liability, and thereby subject him to the danger of being compelled to pay the debt twice. Besides, it would permit one court to interfere with the due execution of process in another tribunal. We are unwilling to place a construction upon the statutes that is liable to lead to such results. Upon principle and authority we are constrained to hold that the garnishment proceedings in the county court in the case of *Scott v. Lanham*, were void, and consequently created no lien upon the fund in controversy.

In the brief of appellant it is said: "All opportunity for conflict of jurisdiction, or for injustice has been avoided by the payment of the entire amount of the Lanham judgment into the district court, and the bringing of the equity proceedings in which all parties interested are made defendants, where all the parties can have their rights adjusted. The garnishee can be protected from double payment and his judgment creditor compelled to satisfy

the judgment of record." This position might, and doubtless would, be tenable were it not for the fact that Lanham, plaintiff's debtor, assigned his judgment against Fitzgerald to the defendant C. H. Rohman, which assignment was filed in the district court of Lancaster county, according to the fifth finding of fact, on April 10, 1893, several months prior to the institution of this equitable action. Therefore, Lanham had no interest in the judgment or the money paid into court when this action was commenced, and, as we have already shown, the garnishment proceedings created no lien upon the money in dispute. There is no room to doubt that when a judgment has been assigned it is not liable thereafter to garnishment at the suit of the creditor of the assignor. * * *

Affirmed.

What May Be Taken on Attachment or Execution.

HAGAN v. LUCAS, in U. S. Sup. Ct., Jan. Term, 1836—35 U. S. (10 Peters) 400.

This is a proceeding instituted in the district court of the United States for the southern district of Alabama, according to the statutes of that state, by Charles F. Lucas, as claimant of property theretofore seized by the marshal of said court on an execution on a judgment of said court in favor of John Hagan against Wm. D. Bynum and A. M'Dade. From judgment in favor of the claimant plaintiffs bring error.

In support of his claim Lucas gave in evidence duly certified copies of the records of three judgments against said Bynum and M'Dade, rendered by the circuit court of Montgomery county, Alabama, and of executions thereon, under which the sheriff of said county had returned levies upon the property involved in this proceeding; and of an affidavit of said Lucas thereafter made and filed in said circuit court alleging that the said property belonged to said Lucas; and of a bond at the same time executed by said Lucas to said sheriff, according to the statute, for the forthcoming of said property if it should be found subject to said executions; and that on the execution and delivery of said bond said sheriff delivered said property to said Lucas, from whose possession it was afterward taken by said marshal on the execution afterward issued by said district court of the United States. Upon this evidence the district court instructed the jury that if

they believed this evidence and that the claim in the circuit court of Alabama county was still pending and undetermined, the property was in the custody of the law and not liable to levy by the marshal. To this instruction plaintiffs except.

McLEAN, J. * * * Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially by an officer acting under a different jurisdiction. But it is insisted in this case, that the bond is substituted for the property; and consequently that the property is released from the levy. The law provides that the property shall be delivered into the possession of the claimant, on his giving bond and security in double the amount of the debt and costs, that he will return it to the sheriff if it shall be found subject to the execution. [*404] Is there no lien on property thus situated, either under the execution or the bond? That this bond is not in the nature of a bond given to prosecute a writ of error, or on

an appeal, is clear. The condition is, that the property shall be returned to the sheriff, if the right shall be adjudged against the claimant. Now it would seem that this bond cannot be considered as a substitute for the property, as the condition requires its return to the sheriff. The object of the legislature in requiring this bond, was to insure the safe keeping and faithful return of the property, to the sheriff, should its return be required. If, then, the property is required by the statute and the condition of the bond to be delivered to the sheriff on the contingency stated, can it be liable to be taken and sold on execution. If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond. For a levy takes the property out of the possession of the claimant, and renders the performance of his bond impossible. Can a result so repugnant to equity and propriety as this, be sanctioned? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the failure. This would indeed be a reproach to the law and to justice. The maxim of the law is, that it injures no man, and can never produce injustice.

On the giving of the bond, the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the sheriff.

In Holt 643, and 1 Show. 174, it was resolved by Holt, chief justice, that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriff; nor can the sheriff take goods which have been distrained, pawned or gaged for debt; 4 Bac. Ab. 389; nor goods before seized on execution, unless the first execution was fraudulent, or the goods were not legally seized under it. * * * [*405]

In *Lusk v. Ramsey*, 3 Munford (Va.) 417, the court decided that the lien, by virtue of a writ of *fiери facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited. In that case, the defendant's property having been levied on by an execution in the hands of the sheriff, was suffered to remain in his possession, on his giving a forthcoming bond for the delivery of the goods on the day of sale; but before the day of sale the defendant delivered the goods in satisfaction of another execution,

and the question was made whether the forthcoming bond released the lien of the first execution. In his opinion, Judge Roane draws the following distinctions between a forthcoming bond, and what is called a replevy bond, under the statute of Virginia. 1. A replevy bond under the act operated a release of the property. 2. Because the surety therein is to be approved by the creditor: a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds. 3. Because a replevy bond obtained the force of a judgment by the mere giving thereof; though its execution was suspended till the expiration of the three months, and did not owe its obligation, as a judgment, to the breach of the condition thereof, as is the case of forthcoming bonds.

The bond given by the claimant Lucas, bears a strong analogy to a forthcoming bond. By the latter, the goods were to be delivered to the sheriff on the day of sale; by the former, the goods were to be delivered to the sheriff, so soon as the right shall be determined against the claimant. In neither bond is the plaintiff in the execution consulted, as is done in a replevy bond, as to the sufficiency of the surety: nor do either of these bonds, like the replevy bond, operate as a judgment, until a breach of the condition. In fact, the bond under the Alabama statute is substantially a forthcoming bond. * * * [*406]

We think, that part of the charge to the jury by the district court which respected the pendency of the suit in the state court, and which was excepted to, was substantially correct: and we are of opinion, that on principle and authority, and also under the construction given to the statute by the supreme court of the state the judgment of the district court must be

Affirmed.

CONN v. CALDWELL, in Ill. Sup. Ct., Dec. Term, 1844—6 Ill. (1 Gilm.) 531.

Attachment. Defendants bring error.

TREAT, J. On the 24th day of February, 1842, Joseph Caldwell sued out of the Madison circuit court, an attachment against Joseph H. Conn, James R. Sprigg and William W. Greene. The writ of attachment was levied on certain real estate, and on the steamboats "Capsian" and "Osage." The sheriff's return stated,

that on the day succeeding the levy, the steamboats were released by order of the sheriff.

The declaration was in *assumpsit*, on three promissory notes. The defendants appeared and pleaded *non assumpsit*. On the 4th day of October, 1842, this issue was heard by the court, and found for plaintiff, and his damages assessed at the sum of \$12,923.46. A judgment was thereupon rendered, that the plaintiff recover of the defendants the said sum and costs; that he have execution therefor, to be levied of the real estate attached, and the steamboats "Capsian" and "Osage;" and also, that he have execution generally for his damages and costs. To reverse that judgment, the defendants prosecute a writ of error.

Since the suing out of the writ of error, the original return of the sheriff on the writ of attachment has been amended in the circuit court, and the amendment certified into this court, and made part of the record. It appears from the amended return, that the steamboat "Osage," at the time of the levy, was freighted and on her passage from St. Louis to the ports on the Illinois river; that it was agreed between the plaintiff and the master, that the boat should proceed on her voyage, and return, and be delivered to the sheriff, subject to the attachment; that the boat was thereupon released, for the purpose of the voyage, but has never been redelivered.

The errors assigned questioned the propriety of the judgment entered. It is insisted in the first place, that the judgment [*536] is erroneous, because it awards execution generally against the defendants.

Where a judgment in default is rendered in a suit by attachment, without personal service of process on the defendant, the judgment is *in rem*, and the estate attached is alone liable for its payment. In such case, a special execution issues for the sale of the specific property. But where the defendant is served with process, or appears to the action, the judgment is *in personam*, and the plaintiff is entitled to a general execution thereon. In this case, the defendants pleaded to the declaration, and the cause was fully determined on the merits. The judgment is, therefore, as conclusive between the parties, as if the action had been instituted in the ordinary way. The plaintiff having the right to a general execution on the judgment, the court committed no error in awarding it.

In the next place, it is insisted that the judgment is erroneous in awarding a special execution. It is contended, that the property attached was released by the appearance of the defend-

ants. This position is not tenable. This precise question was before this court at the present term, in the case of *Martin v. Dryden*, 6 Ill. 187. This court there held, that an appearance of the defendant did not, of itself, discharge the property attached; but that the defendant in order to release it from the lien acquired by the levy, must either replevy the property, or give security for the payment of whatever judgment may be rendered in the cause, as provided in the 29th section of the attachment act. In this case the defendants neither replevied the property, nor gave special bail. The lien created by the levy became perfect by the judgment, and the plaintiff was entitled to a special execution for the sale of the property, except such as he had voluntarily relinquished.

The circuit court decided correctly in embracing the steamboat "Osage" in the award of execution. That boat was released from the custody of the sheriff, for the purpose of the voyage, with the express understanding that the boat should be redelivered and continue subject to the attachment. [*537] The lien on the boat was not thereby extinguished, but still subsists as between the parties to this suit. If, in the meantime, third persons have become interested in the boat, a different question may arise.

The steamboat "Capsian" was absolutely released, and the judgment is erroneous in including it in the award of execution. For this error, the judgment must be reversed with costs. The cause, however, need not be remanded. It was fully adjudicated in the court below, and the proper judgment can be entered in this court. A judgment must be rendered here, that the plaintiff recover of the defendants the sum of \$12,923.46, with legal interest from the 4th day of October, 1842. On this judgment, the plaintiff can have execution generally, and also a special execution for the sale of the real estate attached, and the steamboat "Osage."

Judgment reversed.

EDWARDS v. KEARZEY, in U. S. Sup. Ct., Oct. Term, 1877—96 U. S. 595.

ERROR to the supreme court of the state of North Carolina.

This action was commenced by Leonidas C. Edwards, March 31, 1869, in the superior court of Granville county, North Carolina, against Archibald Kearzey, to recover the possession of certain lands in that county. They were levied upon and sold by the

sheriff, by virtue of executions sued out upon judgments rendered against Kearzey, on contracts which matured before April 24, 1868, when the constitution of North Carolina took effect, the tenth article of which exempts from sale under execution or other final process, issued for the collection of any debt, the personal property of any resident of the state, and "every homestead, and the dwelling and buildings used therewith, not exceeding in value \$1,000, to be selected by the owner thereof." Prior to that date, under statutes since repealed, certain specified articles of small value, and such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value \$50 at cash valuation, and fifty acres of land in the country, and two acres in the town, of not greater value than \$500, were exempt from execution. The lands in question were owned and occupied by Kearzey as a homestead, and as such were set off to him pursuant to the mode prescribed by the legislation for carrying the constitutional provision into effect. He had no other lands, and they did not exceed \$1,000 in value. Edwards was the purchaser at the sheriff's sale of the said lands, and received a deed therefor.

The court found for Kearzey, upon the ground that so much of said art. 10 as exempts from sale, under execution or other final process obtained on any debt, land of the debtor of the value of \$1,000, and the statutes enacted in pursuance thereof, embrace within their operation executions for debts which were contracted before the adoption of said constitution; and that said article and said statutes, when so interpreted and enforced, are not repugnant to art. 1, sec. 10, of the constitution of the United States, which ordains that no state shall pass any law impairing the obligation of contracts. Judgment having been rendered upon the finding, it was, on appeal, affirmed by the supreme court of the state. Edwards then sued out this writ of error.

SWAYNE, J. * * * The only federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the constitution of 1868. The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative view. Our remarks will be confined to this subject.

The constitution of the United States declares that "no state shall pass any . . . law impairing the obligation of contracts." A contract is the agreement of minds, upon a sufficient considera-

tion [*600] that something specified shall be done, or shall not be done. The lexical definition of "impair" is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate." Webster's Dict. "Obligation" is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract," &c. Id. "The word is derived from the Latin word *obligatio*, tying up; and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." *Blair v. Williams* and *Lapsley v. Brashears*, 4 Litt. (Ky.) 65.

The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy the same thing." 1 Bac. Abr., tit. Actions in General, letter B.

In *Von Hoffman v. City of Quincy* (4 Wall. 535), it was said: "A statute of frauds embracing pre-existing parol contracts not before required to be in writing would affect its validity. A statute declaring that the word 'ton' should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy." It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, [*601] and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. *Von Hoffman v. City of Quincy*, *supra*; *McCracken v. Hayward*, 2 How. 608.

In *Green v. Biddle* (8 Wheat. 1), this court said, touching the point here under consideration: "It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests." "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." *Planters' Bank v. Sharp et al.*, 6 How. 301.

It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account.

These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case; and are they not decisive of the question before us? We will, however, further examine the subject.

It is the established law of North Carolina that stay laws are void, because they are in conflict with the national constitution. *Jacobs v. Smallwood*, 63 N. C. 112; *Jones v. Crittenden*, 1 Law Repos. (N. C.) 385; *Barnes v. Barnes et al.*, 8 Jones L. (N. C.) 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation, by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments, [*602]—one against A., the other against B.,—each for the sum of \$1,500, upon a promissory note. Each debtor has property worth the amount of the judgment, and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual installments." At the same time, another law is passed, which exempts from execution the debtor's property to the amount of \$1,500. The court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it; except in the contingency that the debtor shall acquire more property,—a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis.

They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a state may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the constitution, and set at naught the salutary restriction it was intended to impose. * * *

Imprisonment for debt is a relic of ancient barbarism. Cooper's *Justinian*, 658; 12 *Tables*, Tab. 3. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute-book. But upon the power of a state, even in this class of cases, [*603] see the strong dissenting opinion of Mr. Justice Washington, in *Mason v. Haile*, 12 *Wheat.* 370.

Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise, we should abdicate the performance of one of our most important duties. * * * [*607] * * *

We think the views we have expressed carry out the intent of contracts and the intent of the constitution. The obligation of the former is placed under the safeguard of the latter. No state can invade it; and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance nor misfeasance on our part.

The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment. The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subse-

quent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void.

The judgment of the supreme court of North Carolina will be reversed, and the cause will be remanded with directions to proceed in conformity to this opinion; and it is

So ordered.

CLIFFORD and HUNT, JJ., concurred in the judgment. HARLAN, J., dissented.

The doctrine announced in this case is now well established; and expressions to the contrary, many of which will be found in the earlier state reports, are of small practical importance, since this federal question is sufficient to take the case from the supreme court of any state to the supreme court of the United States, where the decision will be reversed if a law impairing the remedy has been sustained as to pre-existing contracts.

AN EARLY VIEW.—In *Sturgis v. Crowninshield*, 4 Wheaton, at page 200, Marshall, C.J., said: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract and simply to release the prisoner does not impair its obligation."

What Is a Valid Levy.

BAILEY v. WRIGHT, in Mich. Sup. Ct., June 18, 1878—39 Mich. 96.

Replevin by Lenna E. Wright against Alvin W. Bailey and William Tinker in Barry circuit court. Judgment for plaintiff, and defendants bring error.

CAMPBELL, C. J. Defendant in error replevied a piano from plaintiffs in error, who defend on the ground that she purchased from one Ackley, and that the purchase was void as against a levy made by them upon an attachment against him.

[*97] Several questions are presented on the record, but inasmuch as the only defense was under the levy, the validity of that is the first matter to be considered.

The defendants by their own testimony showed that while Ackley was temporarily absent, and his house, where his wife was present at the time, was locked up, they broke into it by violence and seized the piano upon the writ. It is admitted this was a trespass, but it is claimed the levy may be a good levy in spite of the wrongful acts by which it was accomplished.

We think this is too dangerous a doctrine to be tolerated. Public policy requires above all things that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which over-zealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such misconduct should neither be justified nor winked at. Any officer who breaks the law should be held to be entirely without excuse, and as fully responsible as any other malefactor.

The doctrine on this subject is so fully discussed in *Ilsey v. Nichols*, 29 Mass. (12 Pick.) 270; 22 Am. Dec. 425, and *People v. Hubbard*, 24 Wend. (N. Y.) 369; 35 Am. Dec. 628, that we need not go into any further investigation. The doctrine is sensible and just, and is the only one whereby private safety and public peace can be preserved. There can be no respect for courts and their process if their ministers are upheld in violations of law, or if they can be lawfully opposed in exercising their functions, as they may be if such levies are held valid.

As the defense entirely failed, it is not important what rulings were made on other points. Judgment must be affirmed with costs.

Levy or service obtained by fraud or tort is void. *Holker v. Hennessey*, 141 Mo. 527, 42 S. W. 1090, 64 Am. St. 524.

HOLLISTER v. GOODALE, in Conn. Sup. Ct. of Errors, Hartford, June, 1831—8 Conn. 332, 21 Am. Dec. 674.

Trespass for taking and carrying away a barouche and harness. Both parties claim as constables levying under attachments against H. Benton. Plaintiff claimed that he obtained the key to the carriage-house where the property was, unlocked the door, attached the barouche, declaring that he attached all carriages and harnesses in the house, and that while he was attempting to remove the carriage defendant forcibly took it from him and

afterward sold it. Defendant claimed that he hid near the carriage-house, and that when plaintiff unlocked the door defendant first entered and seized the barouche, and afterward returned and took the harness. The court instructed the jury that if the plaintiff was at the door with writ and key, and unlocked the door and proclaimed his levy before defendant attached, they should find for plaintiff, and defendant moves for a new trial.

HOSMER, C. J. The inquiries in the case, are, what constitutes a legal attachment ; and whether on this subject, the charge was correct.

I. The word *attach*, derived remotely from the *Latin* term *attingo*, and more immediately from the *French* *attacher*, signifies to take or touch, and was adopted as a precise expression of the thing ; *nam qui nomina intelligit, res etiam intelligit*.

The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent, that to attach is to take the *actual* possession of property. Hence, the legal doctrine is firmly established, that to constitute an attachment of goods, the officer must have *the actual possession and custody*. It was laid down in these express words, by *Parsons, C. J.*, in *Lane v. Jackson*, 5 Mass. 157, 163, and by *Parker, C. J.*, in *Train v. Wellington*, 12 Mass. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle.

The case of *Turner v. Austin*, 16 Mass. 181, decided, that no overt act, by the sheriff, was necessary to constitute an attachment of property, previously in his custody on another attachment. But this is entirely consistent with the principle [*335] advanced. The sheriff already had the actual custody ; and mere form of ceremony, *for form's sake*, and not for the preservation of substance, can never be required.

It was likewise adjudged in *Denny v. Warren*, 16 Mass. 420, that an officer, who entered a store to attach goods, where there was no competition, received the key from the clerk and locked up the store, having declared his intention to attach, had made a sufficient attachment. And in *Gordon v. Jenny*, 16 Mass. 465, the determination was to the same effect.

So in *Naylor v. Dennie*, 8 Pick. 198, it was decided, that inaccessible goods, covered up in the hold of a ship, were at-

tached, by the officers' going on board, and leaving a keeper to take care of them; and in *Merrill v. Sawyer*, 27 Mass. (8 Pick.) 397, that hay in a barn was duly attached, by putting a notification of the attachment on the barn door.

Now, in all these cases, the court went on the principle that the actual possession and custody was necessary to constitute an attachment; although there being no race for priority of attachment, they held that to be the actual custody and possession which, perhaps, was constructive possession only.

The analogous cases all demonstrate the necessity of actually taking the property. This is the established law concerning the levy of executions; that is, the property levied on is actually taken into the custody of law. So when an attachment or execution is levied on the body, it is effected, by a corporal seizing or touching of the body, and thus putting it in the custody of the law (3 Bla. Comm. 288); or by what is tantamount, a power of taking possession and the party's submission thereto. *Genner v. Sparkes*, 1 Salk. 79. *Horner v. Battyn*, Buller on Nisi Prius, 62. But if the person do not submit (and this dead property cannot do) the body must actually be seized.

2. The question now arises, in view of the preceding facts and principles, whether the charge to the jury was correct.

That the plaintiff was at the door of the carriage-house, with a writ of attachment in his hand, only proves his intention to attach. To this no accession is made, by the lawful possession of the key and the unlocking of the door. Suppose, what does not appear, that the key was delivered to him by the owner of the barouche that he might attach the property; this would be of no amount. He might have the constructive possession, which, on a sale as between vendor and vendee, would be sufficient; [*336] but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not the touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not an attachment, nor was the verbal declaration. An attachment is an act done; and not a mere oral annunciation. From these various acts, taken separately or conjointly, the plaintiff did not obtain the possession and custody of the barouche, and therefore, he did not attach the property.

On the contrary, if the facts contended for, by the defendant, were proved, his defense was complete. Between two of-

ficers having separate attachments, there was a race for priority. They both had arrived at the carriage-house; and so soon as the door was opened, the defendant outstripped his competitor, and seized on the barouche. By this act, he had the actual possession, and was successful in his intended prior attachment. I would therefore advise a new trial of the cause.

DAGGETT and WILLIAMS, JJ., were of the same opinion. PETERS, J., was also inclined to concur, though he was not quite satisfied that the charge was wrong. BISSELL, J., was absent.
New trial to be granted.

FIELD v. MACULLAR, in Ill. Appellate Ct., 1st Dist., Oct. Term, 1886—
20 Ill. App. 392.

Before McAllister, P. J., Moran, Bailey, and Healy, JJ.

Bill in chancery by Addison Macullar *et al.*, partners, against Peter W. Field *et al.*, partners, and Eric E. Anderson, to recover money received by Field *et al.* arising from execution sale of property of said Anderson. From decree for complainants defendants bring error.

Field *et al.* recovered judgment against Anderson and the same day had execution issued and the sheriff immediately levied it on Anderson's stock of goods and store fixtures. Macullar *et al.* recovered judgment the next day (Oct. 4, '79), and immediately had execution thereon placed in the hands of said sheriff, who promised to levy it but made no indorsement on the writ. Anderson then moved (Oct. 11th) to vacate the Field judgment, but the sheriff proceeded to sale of the property (Oct. 13th), and against protests by attorney for Macullar *et al.* that the Field judgment was fraudulent, and as to them invalid, paid the proceeds to Field *et al.* in part satisfaction of their judgment and returned the Macullar execution wholly unsatisfied. After said sale and payment the Field judgment was reversed by this court and the case remanded for a new trial. After this Macullar *et al.* demanded said money from Field *et al.*, and payment being refused filed this bill.

BAILEY, J. * * * The principal question in the case is, whether the complainants obtained, by means of their execution, a first and paramount lien on the goods of Anderson levied upon by the sheriff, and upon the proceeds of said goods after the

sale. That said execution became a lien on said property from the time of its delivery to the sheriff, is indisputable. * * *

It is not material that there was no formal levy of the complainant's execution. The sheriff had in his hands a former execution against Anderson, apparently valid, in favor of the defendants, and by virtue of that execution he had levied upon said property and taken the same into his possession. In *Leach v. Pine*, 41 Ill. 65, it was held that where a sheriff has in his hands an execution, and levies upon personal property and reduces it to possession, it is then in the custody of the law, and it is not essential to the lien of other executions in his hands or subsequently received, that they should be formally levied; that the execution first coming to hand authorizes the seizure of the property, which creates the levy, and while it remains in his possession he is unable to seize it again.

Upon the execution sale the liens of the two executions immediately attached to the fund created by the sale, with the same rights to priority which existed before the property was sold. See *Hart v. Wingart*, 83 Ill. 282, and authorities cited. It can not be doubted that the effect of the reversal of the defendant's judgment was to extinguish their lien. If the property had remained up to that time in the hands of the sheriff, it could not afterward have been sold under their execution. The property having been sold and the proceeds having been paid over to them, they were no longer entitled, [*396] as against Anderson, to retain the money, but as between them, it was defendants' duty to repay it to him, and he could have recovered it in an action for money had and received. *Clark v. Pinney*, 6 Cow. (N. Y.) 298; *Maghee v. Kellogg*, 24 Wend. (N. Y.) 32; *Green v. Stone*, 1 Harris & John. (Md.) 405; *Freeman on Executions*, § 346, and authorities cited.

The defendants' lien, then, having been extinguished by the reversal of their judgment, and the complainants' lien having remained in full force, the complainants' right to the fund produced by the sale became paramount, entitling them to have the whole of said fund paid to them in satisfaction of their judgment. Said fund belonged to them, and the defendants having obtained possession of it with notice of the complainants' rights, are properly charged as trustees, holding said fund for the benefit of the complainants. We are of the opinion that there was no error in the decree, and it will therefore be affirmed.

Decree affirmed.

The only proper practice is to indorse the levy on the writ or on some paper annexed thereto, and in an action against a sheriff for misappropriating money made on plaintiff's *fi. fa.* the supreme court of Pennsylvania held that the sheriff should not be permitted in defense to show that he had levied upon and sold the property on a previous writ which had no levy indorsed on it, nor to put in evidence a written levy never attached to such writ and not returned with it but retained in the possession of the sheriff till the trial of the action against him. *M'Clelland v. Slingluff*, 7 W. & S. 134, 42 Am. Dec. 224.

Assumpsit by the first attaching creditor against the second, to whom the proceeds were paid by the sheriff on a sale pending an appeal by the first creditor from an order dismissing his attachment, was sustained in Virginia. *Caperton v. McCorkle*, 5 Grattan 177. A similar action was recently sustained in New York, *Gillig v. Grant*, 23 App. Div. 596, 49 N. Y. Supp. 78; *Haebler v. Myers*, 132 N. Y. 363.

Nature of Attachment and Judgment Liens.

ANON., in Common Pleas, Hilary Term, 2 Henry IV., A. D. 1401—Year-books, 2 Henry IV., page 14, No. 5.

A question was moved before the justices of the common bench, as to the effect of a judgment on a deed of guaranty, which the plaintiff had then and there recovered. And it was moved that such guaranty was only a covenant, and that by such covenant a man does not bind any lands he afterward delivers for value in whose hands soever they come by purchase or otherwise without judgment in any action, for that would be too great a mischief. *Brenchesley*—In an action of debt a man shall not have execution of any lands but of that which the defendant had on the day of the judgment rendered, and not of those lands which he sold while the suit was pending. And of chattels a man shall have execution only of those which the defendant had the day of execution sued. Which was conceded by the court.

JOHN'S CASE, in King's Bench, Mich. Term, 31 Edw. I., A. D. 1303—Y. B. 30 & 31, Edw. I., p. 322.

In trespass by John against W., that he cut off John's finger. on not guilty pleaded, the inquest found that W. had cut off one of John's fingers. In the mesne time, before the inquest passed, W. had divested himself of his land. It was adjudged by ROUBURY that John should recover his damages of 40l., and

that the damages should be levied out of the lands alienated by him (W.) in the mesne time, in whosever hands they had come.

ANONYMOUS, in Common Bench of England, Hilary Term, 31 Eliz., A. D. 1589—Cro. Eliz. 174.

Before Anderson, C. J., Periam, Wyndham, and Walmsley, JJ.

Cooper desired the opinion of the court, that if a *feri facias* be directed to make execution of goods, and after the *teste* of the writ, and before the sheriff executes it, the party sells the goods *bona fide*, if they can now be taken in execution. THE COURT held they might, for by the award of execution, the goods were bound, so that they may be taken in execution, into whose hands soever they come. And WALMSLEY [J.] said so it was ruled in a case at Hertford term, wherein he was of counsel.

SIR GERARD FLEETWOOD'S CASE, in Court of Wards of England. Easter Term, 8 James I., A. D. 1611—8 Coke 171.

Sir William Fleetwood, *anno* 35 Eliz., was possessed of a house and certain lands in Pynner, in the parish of Harrow, in the county of Middlesex, for certain years yet enduring; and *An.* 36 El. he became receiver general of the revenue of the court of wards, &c., and entered into 20 bonds, each of them 200*l.*, with condition to make a yearly perfect account before the 20th of June, &c.; and afterwards upon several accounts, in the years 36, 37, 38 and 39 Eliz. he became indebted to the queen in great sums of money; and he being so indebted, by his indenture, 10 Feb. 40 Eliz., in consideration of 1100*l.* bargained and sold the said lease to James Pemberton, by force whereof he entered, and was thereof possessed; which, by mean conveyance, and in consideration of 1300*l.*, was sold to Sir Gerard Fleetwood. The question was, whether the said messuage and lands are now extendable, or liable to the king's debt? And although it is at the election of the sheriff, either to extend or to sell a lease, so long as it remains in the debtor's hands, as appears in the books of 31 Ass., p. 6; 38 Ass., p. 4; 44 Edw. 3, 16; 7 H., 6, 2, &c., yet it was resolved, that the said sale of the term should bind the king, because the term was but a chattel, and there was no covin in the case, and a sale *bona fide* of chattels is good after judgment, but not after execution awarded, as appears in 2 H., 4, 14, *per Curiam*, [ante] 9 H., 6, 58; 11 H., 4, 7, and of the freehold or inher-

itance which he has at the time of the judgment in case of a common person, and from the time one becomes the king's debtor, 5 Eliz. Dyer 224, 225, *Sir Will. Cavendish's Case*. And the case in 50 Ass., p. 4, was urged to the contrary, where the king's debtor took a lease to him and his wife for years, and before execution the husband died, execution was sued against the wife, for it was the act of the husband, and he had power of the term at the time of his death and the wife came to it without valuable consideration, and *quodammodo* continued the interest of her husband. And COKE, C. J., said, that a receiver, or other accountant who is indebted, shall not be in a worse case than a felon or traitor, who may, after the felony or treason, and before conviction, sell *bona fide* for his sustenance, &c., his chattels, be they real or personal.

STATUTE 29 CHARLES II., CHAPTER 3, §§ 13, 14, 15 AND 16.—A. D., 1677. (Original § 13, cited as §§ 13 and 14.) And whereas it hath bene found mischievous that Judgements in the Kings Courts at Westminster doe many times relate to the first day of the Terme whereof they are entred or to the day of the Returne of the Originall or fileing the Baile and binde the Defendants Lands from that time although in trueth they were acknowledged or suffered and signed in the Vacation time after the said Terme whereby many times Purchasers finde themselves agrieved [§ 14.] Bee it enacted by the authoritie aforesaid That from and after the said foure and twentyeth day of June any Judge or Officer of any of his Majestyes Courts of Westminster that shall signe any Judgements shall at the signeing of the same without Fee for doeing the same sett downe the day of the moneth and yeare of his soe doeing upon the Paper Booke Dockett or Record which he shall signe which day of the moneth and yeare shall be alsoe entred upon the Margent of the Roll of the Record where the said Judgement shall be entred.

(Original § 14 cited as § 15.) And bee it enacted That such Judgements as against Purchasers *bona fide* for valueable consideration of Land Tenements or Hereditaments to be charged thereby shall in consideration of Law be Judgements onely from such time as they shall be soe signed and shall not relate to the first day of the Terme whereof they are entred or the day of the Returne of the Originall or fileing the Baile Any Law, Usage or Course of any Court to the contrary notwithstanding.

(Original § 15 cited as § 16.) And bee it further enacted by the authoritie aforesaid That from and after the said foure and twentyeth day of June noe Writt of *Fieri facias* or other Writt of Execution shall binde the Property of the Goods against whome such Writt of Execution is sued forth but from the time that such Writt shall be delivered to the Sheriffe Under Sheriffe or Conorers to be executed, And for the better manifestation of the said time the Sheriffe Under Sheriffe and Conorers their Deputyes and Agents shall upon the receipt of any such Writt (without Fee for doeing the same) endorse upon the backe thereof the day of the moneth [or ¹] years whereon he or they received the same.

EXPLANATION.—The above are §§ 13, 14 and 15, of the statute as they appear in the "Statutes of the Realm" Vol. 5, p. 841, published in London in 1819, "printed by command of His Majesty King George the Third," etc. Shortly after the statute was enacted some careless scribe divided § 13 numbering the last part of it § 14 and all the succeeding sections one number greater than each bears in the original statute. This blunder has been copied by all the succeeding unauthorized editions of the statute, and §§ 14 and 15 are always cited as §§ 15 and 16 and the same is true of all that follow. See Throop on Verbal Agreements, p. 30. In the Statutes of the Realm the section numbers are in the margin in Roman numerals. I have inserted in § 13, at the place where the division was made, [§ 14] that the student may note the part which is cited as § 14. The [or '] in the last section is as it appears in the Statutes of the Realm, which is explained at the foot of the page by the note: "and" O. omitted.

SMALLCOMB v. CROSS AND BUCKINGHAM, in Common Pleas of England, Mich. Term, 9 Wm. III., A. D. 1697—1 Lord Raymond 251, 1 Comyns 35, 1 Salk. 320.

This decision, rendered by Holt, C. J., Rokeby, Turton and Eyer, JJ., is given according to the report by Lord Raymond. The reporters do not disagree as to the material facts, but the other reports give them more in detail.

In *trover* for goods,, upon the general issue pleaded, at the trial at *nisi prius* in London at Guildhall, before *Holt*, chief justice, the fact appeared to be thus: J. S. recovered judgment in debt against Fox, and J. N. recovered another judgment against Fox. J. S. sued a *fiery facias* upon his judgment, which was delivered to the sheriffs of London at nine o'clock in the morning, but he would not take a warrant of the sheriff to levy the goods, but procured the writ to be indorsed according to the statute of 29 Car. 2. cap. 3. J. N. sued another *fiery facias*, which bore *teste* before the *fiery facias* of J. S. but was delivered to the sheriffs subsequent to the *fiery facias* of J. S., viz. at ten o'clock in the morning, but both the writs were delivered the same day. J. N. took a warrant from the sheriffs, and levied the goods in execution, which the sheriffs sold to the plaintiff Smallcomb. Afterwards the sheriff seized the goods in [*252] execution upon the *fiery facias* of J. S. and sold them to the defendant Cross. And now Smallcomb brought *trover* against Cross and the sheriffs of London; and this matter appearing upon the evidence, *HOLT*, CHIEF JUSTICE, doubting of it, appointed that it should be moved in court. And after argument on both sides it was resolved by the judges that if two writs of execution are delivered

to the sheriff the same day, he has not an election to execute which he pleases, but he must execute that which was first delivered. But if the sheriff levies goods in execution by virtue of the writ last delivered, and makes sale of them (whether the last writ was delivered upon the same day or a subsequent day) the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff. For sales made by the sheriff ought not to be defeated, for if they are, no man will buy goods levied upon a writ of execution. And at common law if a *fi. facias* had been sued the first day of the term, and another *fi. facias* afterwards, and the last had been first executed, the other had had no remedy but against the sheriff. But in this case no action lies against the sheriff, because he who delivered his writ first would not take a warrant from the sheriffs to levy the goods; so that it seems he had a design only to keep the execution in his pocket, to protect the defendant's goods by fraud. *And judgment for the plaintiff by the whole court. * * **

This is a leading case and figures prominently in all discussions of this and kindred questions. It is universally recognized as good law. See *Payne v. Drewe*, ante, 328.

In trespass *de bonis asportatis* by a purchaser at a constable's sale against a sheriff, who took the property from him on a *fi. fa.* against the original judgment debtor in his hands before but not levied till after the levy and sale by the constable, judgment was rendered for plaintiff and affirmed on appeal. *Duncan v. M'Comber*, 10 Watts, (Pa.) 212. *Marsh v. Lawrence*, 4 Cowen (N.Y.) 461, is a similar case.

A sheriff having levied three writs of *fi. fa.* on a horse, brought trover for it against one claiming as purchaser at a sale by a constable on a warrant issued by a justice of the peace and received and levied by the constable after the sheriff received but before he levied his writs. Judgment for defendant was affirmed on appeal, *Smallcomb v. Cross*, and *Payne v. Drewe*, being cited with other decisions as authority. *Jones v. Judkins*, 4 Dev. & Bat. (N. Car.) 454.

The doctrine of *Smallcomb v. Cross* applies only to chattels, for if the judgment is a lien the record of it is notice to everyone and the land may be sold on execution to satisfy it though previously sold under an earlier writ on a junior judgment. *Kirk v. Vonberg*, 34 Ill. 440.

KENNON v. FICKLIN AND PECK, in Ky. Ct. of App., April 25, 1846.
44 Ky. (6 B. Monroe) 414, 44 Am. Dec. 776.

EWING, C. J. This is a controversy between attaching creditors, as to the distribution of the fund attached, their cases against an insolvent debtor and garnishees who owed him being

all heard together. It seems that Kennon's bill was first filed, and his process first placed in the hands of one deputy; that afterwards, on the same day, Ficklin and Peck, each with a knowledge of the fact, and with a view to overreach the claim of Kennon, filed their separate bills, sued out process, and placed the same in the hands of another deputy, who executed the same first, each deputy using reasonable diligence in the execution of the process put into each of their hands.

Upon the hearing of all the cases together, the court gave priority to Ficklin and Peck, decreeing to them the fund due from the garnishee, upon the ground that process was first served on them in the cases of Peck and Ficklin. [*415]

While it is conceded that in the case of distinct officers, the first levy gives the prior lien, yet in the case of the same officer, in the discharge of impartial justice between litigants, it is his duty and that of his deputies to levy that first which first came to his or their hands; and if his deputy levies the junior execution first, it is his duty, upon being apprised of the fact, to pay the money to the plaintiff in the senior execution, as was determined by this court in the case of *Million v. Commonwealth, for the use of Withers*, 1 B. Monroe, 310. Though there is not a perfect analogy between the execution of original process or process of attachment and the levy of an execution, as the officer of sheriff is one, and his deputies his own agents, it is his duty, in the discharge of impartial justice between litigants, to execute and require his deputies to execute all process in the order in which it comes to the hands of either. And the statute, with a view to preserve the time, requires the sheriff to indorse on the process the time of its reception. 1 Stat. Law, 339.

The junior process, it is true, where there are several deputies, may be sometimes first served without fault on the part of the principal or either of his deputies, as in the case before us, when the process in one case was placed in the hands of one deputy, and in other cases in the hands of another, the latter not knowing of the prior process in the hands of the former. Each is required to use due diligence in the execution of the process placed in his hands, and in the exercise of all reasonable diligence on the part of both, one may succeed in the execution of his process first. If that should be the junior process, it would be hard to make the principal liable to the plaintiff in the senior process; nor is it just, necessary or proper, in such a case to make him responsible.

The process in all the cases being served, and the fund at-

tached being in the power and under the control of the court, and all the parties before the court, the chancellor should, in the distribution of the fund, exercise that same impartial justice between the parties, which should have been observed by the officer in the execution of the process. As with him the first come should be first [*416] served, if he or any of his deputies has been seduced, or by trick or stratagem, deluded into the service of the junior first, or if this should happen in the exercise of due diligence on the part of the officers, the chancellor having the control of the fund should distribute it as it would have been distributed had the officer executed them in the order in which they came to hand.

The decree of the circuit court giving priority to Ficklin and Peck, to the demand against Henry and Bett, is reversed, and cause remanded that a decree may be rendered giving the priority and preference to Kennon in the distribution of this fund.

RICHARDS ET AL. v. THE MORRIS CANAL & BANKING CO., in
N. J. Sup. Ct., May Term, 1843—20 N. J. L. (Spencer) 136.

Motion by Richards *et al.* for a rule to amend the sheriff's return to their execution against the above defendant by adding thereto a levy on the property sold by the sheriff under an execution against the defendant in favor of Robt. Thompson, and that the money in court arising from said sale be paid to the plaintiffs.

Plaintiffs' execution was issued and delivered to the sheriff at the September term, 1841; and he would have levied it but for an order entered the same term, staying proceedings under it to enable the defendant to make a defense against the judgment. That issue has now been resolved in favor of the plaintiffs; but in the meantime the sheriff received Thompson's execution and under it levied and sold property for the \$1,724.30 now in dispute.

HORNBLOWER, C. J. It would be the height of injustice to refuse this motion. The property out of which this money was raised was bound by the plaintiffs' execution from the time of its delivery to the sheriff, and he would have levied upon it if it had not been for the misentry or misconception of the rule granted by the court. The execution was not set aside, nor its legal operation in any way suspended, so as to let in a junior execution. The intention of the court was simply to stay the sheriff from making a sale under it until the rights of the parties had been

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settled by the court. The execution, therefore, though not actually levied, continued to be a lien upon the property until it was sold; and that lien followed the proceeds of the sale in the hands of the sheriff. The money in court ought, in my opinion, to be paid over to the plaintiffs in satisfaction of their execution as far as it will go.

Ordered accordingly.

PULLIAM v. OSBORNE, in U. S. Sup. Ct., Dec. Term, 1854—58 U. S. (17 Howard) 471.

CAMPBELL, J. This was an issue in the district court, under a statute of Alabama (Clay's Digest, 213, §§ 62, 64), for the trial of the [*475] right to property taken under an execution from that court, in favor of the appellee, and claimed by the testator of the appellant, as belonging to him, and not to the defendant in the execution. It appeared on the trial that, at the delivery of the execution to the marshal, in favor of the appellee, the property belonged to the defendant, and that the levy was made before the return day of the writ; but that, before this levy, the property had been seized and sold to the claimant, by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the *teste* and delivery of the executions from the district court.

The district court instructed the jury, that a sale under a junior execution from the state court did not divest the lien of the execution from the district court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the state court. The lien of an execution, under the laws of that state, commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the state or the United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.

The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either court were invested with authority to seize the property.

The liens were, consequently, coördinate or equal; and, in such cases, the tribunal which first acquires possession of the property, by the seizure of its officer, may dispose of it so as to

vest a title in the purchaser, discharged of the claims of creditors of the same grade.

This court applied this principle (*Williams v. Benedict*, 8 How. 107) to determine between judgment creditors in a court of the United States, and an administrator holding under the orders of a probate court of a state; in *Wiswall v. Sampson*, 14 How. 52, in favor of a receiver holding under the appointment of a court of chancery of a state and a judgment creditor; in *Peale v. Phipps*, 14 How. 368, in favor of a trustee in possession, under the order of a county court, against such a creditor; and in *Hagan v. Lucas*, 10 Pet. 400, between execution creditors issuing from state and federal jurisdictions. The same principle has been applied, in several state courts, in favor of the purchasers at judicial sales of steamboats, and other [*476] crafts subject to liens in the nature of admiralty liens. *Steamboat Rover v. Stiles*, 5 Blackf. (Ind.) 483; *Steamboat Raritan v. Smith*, 10 Mo. 527; *George v. Skeates*, 19 Ala. 738; and is recognized in the courts of common law and admiralty in Great Britain. *Payne v. Drewe*, 4 East 523; 2 Wms. Ex'rs, 888; *The Saracen*, 9 Eng. Admiralty Rep. 451, 2 W. Rob. 451. * * *

The instruction of the district court is erroneous, and its judgment is therefore

Reversed and cause remanded.

Where the process created a lien from the delivery of it to the officer for execution, an execution was issued on a judgment of a justice of the peace and placed in the hands of a constable. Afterward an attachment was issued from the circuit court in favor of another creditor of the same debtor and given to the sheriff, who immediately seized the debtor's property thereon. The constable then returned his writ: "No goods except in the hands of the sheriff, which he refuses to relinquish." Then the creditor under the justice judgment filed a motion in the circuit court to order the sheriff to pay to him sufficient of the proceeds of the sale of said property to satisfy his execution. The order of the circuit court denying this motion was affirmed on appeal on the authority of *Payne v. Drewe*. *Field v. Milburn*, 9 Mo. 488, 43 Am. Dec. 550. See also *Leopold v. Godfrey*, 50 Fed. Rep. 145; *Derrick v. Cole*, 60 Ark. 394, 30 S. W. 760; *M'Call v. Terwor*, 4 Blackf. (Ind.) 496; *Million v. Commonwealth*, 40 Ky. (1 B. Mon.) 310; *Adler v. Roth*, 5 Fed. 895, 2 McCrary 447; *Burnham v. Dickson*, 5 Okl. 112; *Sharpe v. Hunter*, 47 Tenn. (7 Cold.) 389.

In *Illinois* it was held that a sheriff having a *fi. fa.* in his hands might take property from a constable who had levied on it under a junior distress warrant and that the execution creditor was entitled to be first satisfied out of the proceeds. The decisions are reviewed at length. *Rogers v. Dickey*, 6 Ill. (1 Gilm.) 636; *Hanchett v. Ives*, 133 Ill. 332. See also: *Wells v. Marshall*, 4 Cowan 411. Compare *Lynch v. Hanahan*, 9

Rich. L. (S. Car.) 186; *Charron v. Boswell*, 18 Gratt. (Va.) 216; *Riddle v. Marshal of D. C.*, 1 Cranch C. C. 96, Fed. Cas. No. 11868.

How Lien May Be Lost.

ACTON v. KNOWLES, in Ohio Sup. Ct., Dec. Term, 1862—14 Ohio St. 18.

Action by Acton & Woodnutt, against Horace C. Knowles, sheriff of Athens county, for making a false return to two executions in favor of plaintiffs, one a *fi. fa.*, the other a *venditioni exponas*, the returns complained of being that the stallion levied on under plaintiff's *fi. fa.* was subject to a previous levy by a former sheriff in favor of another creditor, returned "not sold for want of time." From judgment for defendant and order denying motion for new trial, plaintiffs bring error.

PECK, C.J. * * * Ch. J. Savage, in *Russell v. Gibbs*, 5 Cow. 39, examines, at some length, the English and New York cases as to the effect of delay in the sale of property levied on execution, and arrives at the conclusion, that mere indulgence or negligence of the sheriff to proceed and sell, *without any act of the plaintiff*, will not render the levy fraudulent as to subsequent executions; but that the rule is otherwise where the creditor himself directs or sanctions such delay. It is also said in that case, that an unreasonable delay or omission to urge the sheriff to do his duty, may, in some cases, be construed into a consent on the part of the creditor to such delay, and thus postpone his lien to that of junior executions. These positions, thus qualified, are fully sustained by the authorities cited in the opinion, and supported by subsequent decisions in that and other states. *Butler v. Maynard*, 11 Wend. 548, 552; *Benjamin v. Smith*, 4 Ib. 332; *Knower v. Barnard*, 5 Hill, 377; *Herkimer County Bank v. Brown*, 6 Ib. 232; *U. S. v. Conyngham*, 4 Dall. (Pa.) 358; *Gwynne on Sheriffs*, 212 and cases cited.

It is said by Bronson, J., in 6 Hill, *supra*, that "in all the cases where the first execution has lost its preference, something was said by the plaintiff or his attorney, at the time the execution was issued, or at some subsequent period, from which [*28] the sheriff could reasonably infer that he was authorized to give indulgence, instead of complying strictly with the command of the writ."

In New York the common law doctrine prevails, that the

execution of the writ is an *entirety*, consequently, the officer making a levy on execution, must complete the duty by a sale in pursuance of its mandate, and a subsequent *venditioni exponas*, or *distringas*, if issued to him, confers no new or additional authority, but only spurs him on, it is said, to a speedier execution of the power already conferred. Under our practice, however, a sheriff who has returned the writ "levied, but not sold for want of time," can not be required to proceed and sell until a *vendi.* is placed in his hands, for that purpose, by the creditor in execution.

The rule deducible from the cases cited, as applicable to our practice, in which, after return of execution "not sold for want of time," the plaintiff must himself initiate the further proceedings to sell, is this,—that if there has been an *unreasonable* delay in completing the execution by a sale, at the instance and by the authority of the plaintiff, such unreasonable delay may have the effect of postponing his, in a certain sense, dormant process, to that of a more vigilant though junior execution creditor. Mere delay, if not unreasonably protracted, will not have such effect: but where the delay is unreasonable, in view of the rights of other creditors, the character and condition of the property levied on, and the uses to which it is, in the meantime, applied, it is just and proper that a limit should be placed upon the indulgence of the creditor holding such prior lien.

The question whether such delay was reasonable or unreasonable in a given case, depends upon its particular circumstances and is therefore peculiarly a question for the jury, under the instructions of the court. It is manifest that a delay which is unreasonable in one case, by reason of the condition of the parties or the subject matter of the levy, would, under other circumstances, be altogether reasonable and proper.

The return of the property to the defendant after levy, to be kept by him until required for sale, either with or without [*29] security for its re-delivery, does not *per se* avoid the levy. The debtor thereby became the bailee of the property, and the officer was still constructively in possession. But such fact, coupled with others, relating to the intended duration of such possession; the authority delegated to the debtor or exercised by him with the knowledge and assent of the sheriff; the uses to which it was, in the meantime, to be applied; the benefits, if any, resulting from its custody, and the subsequent delay in bringing the property to sale, may be of much significance in determining whether the levy was not, in part at least, designed to protect the property from

seizure by other creditors, for the benefit of the debtor, and therefore fraudulent as to them.

In the case at bar, an execution in favor of the Exchange Bank of Columbus was levied September 11, 1857, upon a stallion, the property of Currier, and the execution thereupon returned to Franklin common pleas, "not sold for want of time." No further execution was issued until November 3, 1858, nearly fourteen months after return of the first, and more than four months after a levy by plaintiffs upon the same property. The sheriff upon making the levy returned the horse to defendant Currier, and permitted him to hire the horse out the ensuing season for his own benefit, the profits greatly exceeding all expenses of keeping, and never interposed to prohibit such use, or claim for the execution creditor any part of the profits arising therefrom.

The officers of the bank may not have known how the horse was disposed of; but if so, they were willfully blind. The information conveyed by the return was sufficient to put them, as prudent men, upon inquiry as to the temporary disposition of the horse. The question would naturally occur, how and at whose expense is this horse to be supported while awaiting a sale? And the answer to such inquiry, would, at once, have put them in possession of the facts, and rendered them responsible for the further continuance of that condition of things. If, on the other hand, the bank and its officers were truly ignorant of the temporary disposition of the horse, and the authority conferred upon Currier, and are not chargeable [*30] with notice of the acts of the officer in making disposition of the property levied on, which we by no means concede, still a failure by them for more than fourteen months thereafter to offer the horse for sale, would be a circumstance for the consideration of the jury, as tending to show that one, if not the principal object of the levy and its prolongation, was to shield the property from a seizure by other creditors, for the benefit of the debtor.

In view of these circumstances it was error, we conceive, in the court to charge the jury, either as matter of law or as a foregone conclusion of fact, that the levy of September 11, 1857, was, as against the plaintiffs, a valid and subsisting levy in June, 1858, when the horse was seized under their execution.

It was a question of fact peculiarly within the province of the jury, to determine, under all the circumstances before them tending to show an abuse or perversion of the process of the court, and should have been submitted to them under proper instructions.

* * *

Judgment reversed and cause remanded.

To same effect see *McGinnis v. Prieson*, 85 Pa. St. 111.

This looks like a clear case under the rule as stated by the court, which is as generally stated. Nevertheless some courts hold to a much stricter rule. For example, in a recent case, the first creditor was held to have lost his priority by reason of consenting to a postponement of the sale from Jan. 22 to Jan. 29, and then to Feb. 8, and then to Feb. 11, and then to Feb. 13, to enable the debtor to get money to make payment and thus save his property, it being found that the action of the creditor was prompted by kindness to the debtor, without intent to delay or defraud other creditors, and although other creditors were not prejudiced thereby. *Sweetser v. Matson*, 153 Ill. 568, 46 Am. St. Rep. 911, 39 N. E. 1086.

EVANS v. BARNES, in Tenn. Sup. Ct., Dec. Term, 1852—32 Tenn. (2 Swan) 291.

Trover by Evans against Barnes for cotton mentioned in the opinion. From judgment for defendant plaintiff brings error.

CARUTHERS, J. On the 8th day of November, 1850, the plaintiff bought of Ransford McGregor the six bales of cotton for which this action of trover was brought. On the same day the clerk of Rutherford circuit court issued an execution on a judgment in favor of B. Ferguson, against said McGregor, tested July term, 1850, addressed to the defendant as sheriff of Davidson county, who, by his deputy, levied the same upon the cotton on the 11th of November, 1850, the return day of the execution. This writ was returned, with the levy, to the November term. [*293] from which another *fiery facias* issued, tested second Monday of November, 1850, on same judgment, which came to the hands of defendant on November 20th, and was on same day levied upon the cotton, which was sold, December 5th, for \$355.73, as appears by the return on the last *fiery facias*. It does not appear by whom the last execution was ordered out. * * *

The levy of the execution vested in the sheriff a special property in the cotton, and was a satisfaction to the extent of its value. He became liable to the plaintiff in the execution, and the debt was extinguished for that amount. The execution was a lien from its test, second Monday in July, 1850, and overreached the title by purchase of the plaintiff's. The power of the sheriff to sell the property still continued after the return of the writ, and even after the expiration of his term of office. *Overton v. Perkins*, 10 Yerg. 328. The authorities all concur in this position, in cases of levies upon personal estate. It is otherwise when the levy is upon land.

But it is contended in this case that the sale having been made under an *alias fieri facias*, which was issued from the November term, 1850, of Rutherford circuit court, and tested on the twelfth day of that month, which was after the purchase of the plaintiff's, the first levy was waived, and the right by purchase must prevail. We do not think so. It is true that the plaintiff in the execution might waive the benefit of a levy in his favor [*294] and release the sheriff from his liability and the property from the custody of the law, in which case the original owner would have the power to make a valid sale of it. But such waiver must be distinctly and clearly proved. It is not enough, to produce this effect, that another *fieri facias* was issued, which the sheriff relieves upon the same property, and makes his sale upon it. He had a perfect right to sell, by virtue of the title vested in him by the first levy, without any execution; or, he might have retained the first execution and sold under it during the term to which it was returnable, or after the term, when it was *functus officio*. The issue of an *alias*, or another order of sale, was not necessary to continue his right under the previous levy. Even the taking of a delivery bond, on a levy afterwards made on the same execution, or an *alias*, without forfeiture, would not be a waiver of his title, or a forfeiture of his right to sell under the first levy. *Lester's Case*, 4 Humph. 383. The issuance and use of the last execution was merely nugatory and useless; at least it did not affect his right to the property derived from his original levy, which related to, and bound, the property from the *teste* of the first execution, on the second Monday in July, 1850.

Let the judgment of the circuit court be affirmed.

To the same effect as to sale under *alias* instead of *vendi*, see *Bouton v. Lord*, 10 Ohio, St. 453; *West v. St. John*, 63 Iowa, 287, 19 N. W. 238; *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978; *Menge v. Wiley*, 100 Pa. St. 617; *Wilson v. Gilbert*, 58 Ill. App. 651, 161 Ill. 49. CONTRA: *Scott v. Hill*, 2 Humph. 143. Same as to attachment *Wright v. Westheimer*, 2 Idaho 962, 35 Am. St. Rep. 269.

In Illinois it is held that when judgment in attachment is rendered without personal service or appearance, the return of the first execution without sale ends the whole proceeding and that there is no authority to issue any further process or make any further disposition of the property. *Keeley Brewing Co. v. Carr* (1902), 64 N. E. 1030, 198 Ill. 492. See also *Butler v. White* (1879), 25 Minn. 432. But see *Van Camp v. Searle* (1895), 147 N. Y. 427, 41 N. E. 427.

ROCKHILL v. HANNA, in U. S. Sup. Ct., Dec. Term, 1853—56 U. S. (15 Howard) 189.

Action by Thos. C. Rockhill *et al.* against Robert Hanna *et al.* on a U. S. marshal's bond, to recover the proceeds of an execution sale. The case is certified here by the U. S. circuit court for district of Indiana, for the opinion of this court. Rockhill *et al.*, Price *et al.* and Siter *et al.*, each recovered judgments against John Allen, Nov. 19, 1838. Price and Siter each took out writs of *fiery facias* which were levied on Allen's land. But previous thereto Rockhill had taken out *ca. sa.* on which Allen was imprisoned till discharged by the passage of a law in Indiana abolishing imprisonment for debt. Rockhill then took out a *fiery facias* which was levied on the land previously taken on the other writs. The land being sold under these executions, and the proceeds being insufficient to pay all, Rockhill claimed that the money should be first applied on his judgment.

GRIER, J. * * * In the state of Indiana judgments are liens upon "the real estate of the persons against whom such judgments may be rendered, from the day of the rendition thereof." As the statute provides for no fractions of a day, it follows that all judgments entered on the same day have equal rights, and one cannot claim priority over the other. In England, when several judgments are entered to the same term, (and by fiction of law, the term consists of but one day,) the judgment creditor, who first extends the land by *eligit*, is thereby entitled to be first satisfied out of it. The case would be much stronger, too, in favor of the first *eligit*, if one of three judgments had levied a *fiery facias* on the goods and chattels of the defendant, the second taken his body on *ca. sa.*, and the third laid his *eligit* on his land. For each one, having elected a different remedy, would be entitled to a precedence in that which he has elected. This principle of the common law has been adopted by the courts of New York, as is seen in the cases of *Adams v. Dyer*, 8 Johns, 350, and *Waterman v. Haskin*, 11 Johns. 228; and also by the supreme court of Indiana, in *Michaels v. Boyd*, Smith 100, where it is said, the mere delivery of an execution, as in case of personal property, will not give a priority, but the execution first begun to be executed, shall be entitled to priority.

The application of these principles to the present case would give the preference to the judgments of Siter and Price, which were levied on the land five years before the plaintiff's levy on

the same. An execution levied on land, is begun to be executed, and is an election of the remedy by sale of it; and [*196] the mere delay of the sale, if not fraudulent, injures no one and cannot postpone the rights of the creditor who has first seized the land and taken it into the custody of the law for the purpose of obtaining satisfaction of his judgment. If he has obtained a priority over those whose liens are of equal date, by levying his execution, he is not bound to commence a new race of diligence with those whose rights are postponed to his own. There may be a different rule as to a levy on personal property, where it is suffered to remain in the hands of the debtor. But liens on real estate are matters of record and notice to all the world, and have no other limit to their duration than that assigned by the law.

But we do not think it necessary to rest the decision of this case, merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment. It is true, if the debtor should die in prison, or be discharged by act of the law without consent of the creditor, he may have an action on the judgment, or leave to have other executions against the property of his debtor. The legal satisfaction of the judgment, which for the time destroys its lien and postpones his rights to those whose liens continue, is not a satisfaction of the debt, but, as between the parties to the judgment, it operates as a satisfaction thereof. The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of the creditor, the judgment is forever extinguished, and the plaintiff remitted to such contracts or securities as he has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension.¹ The case of *Snead v. M'Coull*, 12 How. 407, in this court, fully establishes this doctrine. It is to be found in the common law as early as the Year Books, and is admitted

¹ *Jackson v. Benedict*, 13 Johns. 533. Setting aside a return of "satisfied" on a *fi. fa.* does not revive the judgment lien on land so as to defeat innocent mesne purchasers. *Taylor v. Ranney*, 4 Hill (N. Y.) 619.

to be the law in almost every state in the union. See Year Book, 33 Henry VI. p. 48; *Foster v. Jackson*, Hobart 52; *Burnaby's case*, 1 Strange 653; *Vigers v. Aldrich*, 4 Burr. 2482; *Jaques v. Withy*, 1 Term R. 557; *Taylor v. Waters*, 5 Maule and Selwyn, 103; *Ex parte Knowell*, 13 Vesey, Jr., 192; and in New York, *Cooper v. Bigalow*, 1 Cow. 56; *Ransom v. Keys*, [*197] 9 Cow. 128; *Sunderland v. Loder*, 5 Wend. 58. In Pennsylvania, *Sharpe v. Speckenagle*, 3 Serg. & R. 463. In Massachusetts, *Little v. The Bank*, 14 Mass. 443.

The insolvent law of Indiana which discharges the person of the debtor from imprisonment upon his assigning all his property for the benefit of his creditors, provides that his after acquired property shall be liable to seizure, and also that liens previously acquired shall not be affected by such assignment and discharge; but it does not affect to change the relative priority of lien creditors, as it existed at the time of the discharge, or to take away from any lien creditor his prior right of satisfaction, which had been vested in him previous to such discharge. Neither the letter nor the spirit of the act will permit a construction which by a retrospective operation would divest rights vested before its passage.

We are of opinion, therefore, that * * * the executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale. * * *

So certified to the said circuit court.

To same effect on similar facts, *Miller v. Starks*, 13 Johns. (N. Y.) 517. A direction by the creditor to the sheriff to levy on certain property is not an abandonment of his lien on the remainder, and the sheriff who has levied on that part may at any time before the return-day levy on and inventory other property, though the defendant has in the meantime assigned for the benefit of creditors, the writ being a lien from the date of its delivery. *Moses v. Thomas*, 26 N. J. L. 124.

ERICKSON v. DULUTH, SOUTH SHORE & ATLANTIC RY. CO.,
in Mich. Sup. Ct., May 21, 1895—105 Mich. 415, 63 N. W. 420.

Garnishment by Edward Erickson against Duluth, South Shore & Atlantic Ry. Co. as garnishee of Mark Cuppernill, principal defendant. From judgment charging the garnishee it brings error.

Erickson sued Cuppernill in justice court and immediately had the railway company summoned as garnishee, and it answered confessing liability for \$39.65. Thereafter the main action was tried and the justice rendered judgment, no cause of action.

Plaintiff appealed to the circuit court, giving the garnishee notice thereof, and the justice returned the record in the main action to the circuit court without the record of the garnishment proceedings, and thereafter mailed a discharge to the garnishee, and still later returned the garnishment record to the circuit court, showing the discharge above mentioned. On the trial of the main action in the circuit court judgment was rendered for plaintiff, and immediately thereafter, on motion of plaintiff's attorney, judgment was rendered against the garnishee for the amount admitted in its answer. The garnishee having made no appearance in that court, claims that it acted without jurisdiction in rendering judgment against the garnishee because the judgment for defendant, by statute terminated the liability of the garnishee; and at all events the liability could not thereafter be enforced, because the statute does not provide for any further proceedings.

HOOKE, J. * * * While § 8041 (How. St.) treats plaintiff's failure to recover "judgment against the defendant" as a discontinuance, § 8038 provides that, after the "*final* determination of the suit against the defendant," proceedings may be taken before the justice to obtain a judgment against the garnishee. This is consistent with the claim of plaintiff that the garnishee is not released by a judgment in favor of defendant unless it is final. Section 8040 also contains the expression "final determination," and prescribes the pleading and procedure against the garnishee "after a final determination of the suit pending against the defendant." It would require an unusually strict construction of § 8041, and the exclusion of the other sections, to hold that the garnishee would be released by a judgment in justice's court in the defendant's favor, when the plaintiff had appealed. Such construction would be at variance with the rule in attachment cases, it having been held that a judgment against a plaintiff, appealed from, does not dissolve the attachment, but the lien of the writ continues until the final disposition of the case against him. *Treat v. Dunham*, 74 Mich. 114; *Vanderhoof v. Prendergast*, 94 Id. 18. By analogy the same would be true in garnishment cases, unless the statute upon which the right depends indicates the contrary. The garnishee, under this chapter, would be discharged when the action was finally determined against the plaintiff, but he is chargeable with knowledge of the law which gives the right of appeal, and that, if the appeal is taken, he is not released until final judgment. The supreme court of Iowa has held that a judgment of nonsuit dissolves an attachment, and that

it will not be revived by the vacating of the judgment. *Brown v. Harris*, 2 G. Greene (Iowa) 505; *Harrow v. Lyon*, 3 Id. 157, 159. See, also, *Clap v. Bell*, 4 Mass. 99; *Suydam v. Huggerford*, 40 Mass. (23 Pick.) 465. But the latter case recognizes [*419] the rule that the attachment is not dissolved where the plaintiff appeals. See, also, *Sherrod v. Davis*, 17 Ala. 312; *Danforth v. Rupert*, 11 Iowa 547, 551. Such has already been shown to be the rule here. In *Dolby v. Tingley*, 9 Neb. 412, 416, the court said: "Where no steps are taken to dissolve the attachment, the garnishee is bound from the time of service until final judgment." *Chase v. Foster*, 9 Iowa, 429; *Kennedy v. Tiernay*, 14 R. I. 528, 530; *Puff v. Huchter*, 78 Ky. 146. It is true that these decisions all depend upon the statutes of their respective states, but they show the trend of the authorities when the statutes are open to the construction that the garnishee is bound until final judgment.

We have next to inquire concerning the effect of the new section added in 1891 (Act No. 178, Laws of 1891, § 28), and the justice's order under it. This section provides: "In all cases where the defendant prevails or takes an appeal in the principal suit, the court shall make an order releasing said moneys so garnished. Said order shall be directed to the garnishee defendant, and shall be delivered to the principal defendant * * * "

It must be read with those already discussed, for the latter are not repealed. Unless we are to adhere to the defendant's construction, viz., that this section means that the justice shall discharge the garnishee in cases where the defendant prevails before the justice in the principal suit, this section is not inconsistent with the sections already discussed, and the construction hereinbefore placed upon them. If it is to be so construed, it is inconsistent with them. It is also noticeable that this section does not provide that the justice, but that the *court*, shall make the order of discharge, thus putting it into the power of whatever court shall render the final judgment to make this order. It seems to be intended that [*420] this order shall be made upon application of the principal defendant, and for his benefit, and apparently was designed to facilitate the collection of his claim from the garnishee, after the garnishee's liability to the plaintiff should have ceased. We are therefore of the opinion that the adverse judgment did not release the garnishee from the plaintiff's claim.

Authorities will be found which indicate that the plaintiff should have appealed from the order discharging the garnishee, and that, not having done so, he cannot now question it. Such a case is *Brown v. Tuppeny*, 24 Kan. 29. See, also, 8 Amer. & Eng.

Enc. Law, 1258. Under the statutes cited, the justice had no authority to do more in the garnishee case than to take and file the disclosure, and adjourn the proceeding until judgment should be rendered; and we have already said that this means final judgment. The appeal removed the principal case from his jurisdiction, and thereafter only the circuit court had authority to make the order of discharge. The order made by the justice was made before the appeal was taken, and was premature. He had no authority to make it. He should have waited the statutory period within which the plaintiff might appeal. His order was therefore void, and it was not necessary for the plaintiff to appeal from it. The case of *Kennedy v. Tiernay*, 14 R. I. 530, involves this question. The court said: "The court is not called upon to pass upon the liability of the garnishee until the plaintiff has established his claim, and obtained a judgment against the defendant. If the plaintiff fails in the suit against the defendant, the question of the garnishee's liability does not arise." In this case the court held that the appeal brought up the garnishee proceedings as incident to the principal suit.

This brings us to the remaining question in the case, viz., whether the garnishee proceeding was brought to [*421] the circuit by the appeal of the principal suit, so that the circuit court might enter a judgment against the garnishee. The authorities are not harmonious upon this subject. Some cases—like the Rhode Island case cited—hold this doctrine. Counsel for the plaintiff cites several cases to the proposition that the garnishee proceeding is ancillary to the principal case, and must, of necessity, follow it when it is appealed. But we think this must depend upon the statute, and that our statute clearly shows a contrary intention on the part of the legislature. * * *

In our opinion, the statute contemplates that the action in justice's court against the garnishee should remain in abeyance pending the appeal in the principal case. After judgment the justice might issue his summons to show cause, the issue could then be joined, and proof of the circuit court judgment, when introduced, would furnish the foundation for a judgment against the garnishee. Inasmuch as this practice was not [*422] followed, we have no alternative but to reverse the judgment. No new trial will be necessary, as the circuit court has no jurisdiction of the proceeding.

Reversed.

This is the only decision I am aware of holding that the garnishment does not go with the main action if it survives, but a court of error will not consider errors in the garnishment proceedings on error from the judgment in the main action. Judgment discharging the garnishee has been held not to be stayed by an appeal in the absence of an express order preserving the plaintiff's lien. *Maxwell v. Bank of New Richmond*, 101 Wis. 286, 77 N. W. 149; *Webb v. Miller*, 24 Miss. 638.

IN MICHIGAN, NOW.—"In all cases where the plaintiff shall appeal * * * the justice * * * shall return all garnishment proceedings ancillary to such suit, together with the main action to the court to which the appeal is taken, and thereafter proceedings against the garnishees may be conducted in said last mentioned court in the same manner in all respects as if originally commenced therein." Comp. Laws, (1897) § 1018.

Nearly all the decisions are that an appeal from the judgment for defendant preserves the lien if plaintiff observes the proper steps. Besides cases cited in the opinion see *Munn v. Shannon*, 86 Iowa, 363; *Lowenstein v. Powell*, 68 Miss. 73; *Ryan Drug Co. v. Peacock*, 40 Minn. 470; *Riley v. Nance*, 97 Cal. 203; *Caperton v. M'Corkle*, 5 Gratton (Va.) 177. But compare *Maxwell v. Bank of New Richmond*, above, and CONTRA: *Camp v. Hilliard*, 58 N. Hamp. 42.

REID v. LINDSEY, in Pa. Sup. Ct., Nov. 5, 1883—104 Pa. St. 156.

Debt on bond of indemnity, by Lindsey, Sterrit & Co. against George T. Van Doren, obligor, and Lewis Shanafelt and John C. Reid, sureties, Reid only being served. From judgment for plaintiffs Reid brings error.

The bond sued on was given by Van Doren as general assignee for creditors of David M. Sample, to obtain a stay of execution in favor of plaintiffs herein against said Sample, which, before said assignment, had been levied on Sample's merchandise and store fixtures, Van Doren having petitioned for said stay and that the judgment be opened to let him show the judgment to be excessive. Afterward the judgment was opened for that purpose, the issue twice retried and judgment finally entered for plaintiff for \$822 instead of \$923, the amount of the original judgment. In the meantime Sample was adjudicated a bankrupt, but the assignee in bankruptcy never interfered with the goods.

On the trial of the present action defendant offered to prove the value of the property subject to the levy at the time the last judgment was rendered to show that the greater part of it could have been realized therefrom. This testimony was objected to on the ground that by opening the judgment the lien of the levy was discharged. The objection being sustained and exception taken presents the only question before this court.

GREEN, J. We decided in *Batdorff v. Focht*, 44 Pa. St. (8 Wr.) 195, that the lien of *feri facias* upon goods levied on under the writ was not lost by reason of a judicial order staying it until a rule taken on part of the defendants should be disposed of. although there was no stipulation in the order staying the writ that its lien should remain. The very question was raised on the record on distribution of the proceeds of the goods which were sold on a subsequent writ, and the money was awarded to the first writ upon the express ground that the lien was not lost. The same doctrine was again declared in *Bain v. Lyle*, 68 Pa. St. (18 P. F. S.) 60, and although in that case a bond had been given for the return of the goods, it was held to be no substitute for the [*160] goods, and that the lien of the execution was not discharged. In *Kightlinger's Appeal*, 101 Pa. St. (5 Out.) 540, these cases were recognized as full authority for the rule, and would certainly have been applied had the circumstances of that case required it. It was unnecessary to do so, but only because an order continuing the lien had been made when the stay of proceedings was granted. The rule itself was vindicated by Woodward, J., in *Batdorff v. Focht*, by the proposition that the lien of *feri facias* after levy is a vested lien which cannot be impaired by an interlocutory order. Although, as was there said, it is the usual and proper practice to direct that the lien shall remain, when a stay is ordered, it was held to be unnecessary. The judge said, "But where, as in this case, it is omitted, the lien must, nevertheless, be regarded as preserved, for it is one of the vested legal rights of the plaintiff, and can no more be sacrificed by an edict of the court without a hearing than any of his other civil rights, whether of liberty or property." This reasoning is so entirely satisfactory that it need not be extended. In *Batdorff v. Focht*, and in *Kightlinger's Appeal* the lien was made effective by awarding priority to the writs in the distribution of the proceeds of the sale of the goods upon subsequent writs, although in the latter case an interval of nearly four years elapsed between the granting and discharge of the rule to open the judgment. In *Bain v. Lyle* an execution against Austin was levied upon goods which were claimed by Corry. The latter gave an interpleader bond to the sheriff, and the goods were thereupon delivered to him. Subsequently they were sold on an execution against Corry, and purchased by a stranger. The interpleader issue being decided in favor of Austin, it was held he might follow the goods in the hands of the purchaser at the last sale. This, of course, was upon the theory that the original execution creditor could not

be deprived of his recourse to the goods, notwithstanding they had been given up to the adverse claimant upon his substituting an interpleader bond in their place. In the present case the bond given was a general indemnity bond only, and in no sense a substitute for the goods. It was for indemnity against all damages which might be sustained by reason of the order staying proceedings. It contained no provision for a return of the goods. It is plain then that if any of the goods originally levied upon still remained in the possession of the defendant in the execution, or of his assignee, for the benefit of creditors, who is merely his representative [*In re Fulton's Est.*, 51 Pa. St. (1 P. F. S.) 204], it was the right of the plaintiff to seize them by another writ, and sell them in satisfaction of his claim. If they had passed to an assignee in bankruptcy, which does not appear in the testimony, they would still be subject to the lien of the levy originally made. The offer [*161] of proof was somewhat indefinite, but in substance, it was proposed to show the value of the goods which remained subject to the levy at the time of the final judgment, and that the plaintiffs could have realized the greater part of their judgment out of personal property which remained subject to the levy. This offer was rejected on the ground that the lien of the execution was discharged, and that the property had passed to an assignee for the benefit of creditors, and afterward to an assignee in bankruptcy. This was an insufficient objection, and the learned court below was in error in rejecting the offer, and the judgment must therefore be reversed. The evidence offered was material because it might show that the sureties in the indemnity bond were released in whole or in part by the omission of the plaintiffs to seize and sell the remaining goods. * * *

Judgment reversed and venire de novo awarded.

This case must be distinguished from *Field v. Macullar*, ante, p. 386, in which the judgment was reversed on motion of the judgment debtor. As there can be no execution without a judgment to be executed it is clear that if the judgment is set aside the execution and all proceedings thereon must fall. See *Karr v. Schade*, 75 Tenn. (7 Lea) 294; *Spaulding v. Lyon*, 2 Abb. New Cas. (N. Y.) 203; *May v. Cooper*, 24 Hun (N. Y.) 7. Thus it was held that an execution on a judgment against three was vacated by reversing the judgment as to one of the defendants. *Phillips v. Wheeler*, 67 N. Y. 104. But in the present case the judgment remained so far as the judgment defendant was concerned. All that was done was to allow a claimant of the goods to show a defense. Compare, *Richards v. Morris C. & B. Co.*, ante, 453.

At common law a writ of error operated as a supersedeas from the time of its allowance without any special order to that effect, and it is only where similar operation is given to the statutory appeal or writ of

error under the statute that such decisions as *Rocco v. Parczyk*, 77 Tenn. 328, are found, unless a supersedeas was expressly granted by the court; from which the real conflict between that case and *Reid v. Lindsey* clearly appears. It is quite as reasonable to hold that the bond given to obtain the supersedeas should take the place of the property as that the bond for the appeal, which operates as a supersedeas, should do so. Accordingly we find several decisions to the effect that a stay of proceedings under execution or attachment divests the lien of the writ. *McCamy v. Lawson*, 40 Tenn. (3 Head) 256; *Burks v. Bass*, 7 Ky. (4 Bibb.) 338; *Eldridge v. Chambers*, 47 Ky. (8 B. Mon.) 411. CONTRA: Besides *Reid v. Lindsey* and cases cited, see *Bond v. Willott*, 31 N. Y. 102, *Freeman v. Dawson*, 110 U. S. 264.

Likewise, that the bond given to obtain an injunction takes the place of the property held on the execution enjoined and the lien is discharged. *Keith v. Wilson*, 3 Metc. (Ky.) 201; *BARNES v. BAKER*, Minor (Ala.) 373; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498; *Bisbee v. Hall*, 3 Ohio 449.

But on the other hand it is held that the lien is not divested by the injunction (*Knox v. Randall*, 24 Minn. 479; *Lamore v. Cox*, 32 La. Ann. 246; *DUCKETT v. DALRYMPLE*, 1 Rich. L. (S. C.) 143), and the senior creditor is entitled to the proceeds of a sale under a junior writ, while the injunction was in force (*Lynn v. Gridley*, Walk. (Miss.) 584, 12 Am. Dec. 591, contra *Mitchell v. Anderson*, 1 Hill L. (S. Car.) 69, 26 Am. Dec. 158), provided, of course, a levy had been made under his writ before the injunction issued. *Launtz v. Gross*, 16 Ill. App. 329; *Lynn v. Gridley*, above. But see, *Richards v. Morris C. & B. Co.*, 20 N. J. L 136, *post* 394.

Thus the conflict is seen to run all along the line, and no reason is perceived why the effect of a stay, injunction, appeal operating as a supersedeas, or a delivery on bond should not each have as much effect on the lien of the execution or attachment as any other of them. Nor do I remember any attempt in any of the cases above cited to distinguish them, but, on the contrary, as in *Rocco v. Parczyk*, the courts frequently argue that one follows from the others. However, this distinction may be seen: In Kentucky the court holds that only of these, in behalf of the judgment debtor, divests the lien, but replevin of the property from the sheriff by a claimant does not, and after judgment against the claimant in the replevin suit the property may, if found, be sold on the original execution. *Ferguson v. Williams*, 3 B. Mon. 302. See also *Street v. Duncan*, 117 Ala. 571, 23 South 523; *HAGAN v. LUCAS*, 35 U. S. (10 Peters) 400.

What Is a Satisfaction and Rights Thereon.

HEILIG ET AL. v. LEMLEY AND SHAVER, ADM'RS., in N. Car. Sup. Ct. Jan. Term, 1876—74 N. C. 250, 21 Am. Rep. 489.

Motion by plaintiffs for leave to issue execution on a judgment recovered against defendant's intestate and others, on which execution had been issued and delivered to W. A. Walton, sheriff of the county, to be executed. The sheriff having failed

to execute the writ before it was spent, paid the amount named in it to the plaintiffs, all of whom then signed an assignment of the writ endorsed thereon to the sheriff's son, L. W. Walton, for whose benefit this motion is made. From an order granting the motion defendants appeal.

McCorkle & Bailey, for appellants, contended, (1) that there had been no legal assignment of the judgment, and (2) that if otherwise valid the assignment was void on grounds of public policy, being obtained by money of the sheriff.

RODMAN, J. The question is whether a sheriff who has made himself liable to a plaintiff by his negligent delay in collecting an execution, and who pays off the debt in his own exoneration and takes an assignment from the plaintiff to a third person in trust for himself, has thereby extinguished the judgment, so that he cannot have an *alias* execution issued to another officer upon it?

The cases cited by the learned counsel for the defendants from New York do certainly establish that, in that state, upon grounds of public policy, the judgment is absolutely extinguished. *Reed v. Pruyn*, 7 Johns. 426; *Sherman v. Boyce*, 15 Johns. 443; *Bigelow v. Provost*, 5 Hill, 566, and others which may be found cited in a note to Herman on Executions, 205. Nor is this doctrine confined to New York. It is so held in Alabama: *Roundtree v. Weaver*, 8 Ala. 314; *Boren v. M'Gehee*, 6 Porter, 432; *Crutchfield v. Haynes*, 14 Ala. 49; in Tennessee, *Smith v. Herman*, 1 Cold. 141; but see *Lintz v. Thompson*, 1 Head 456; in Missouri, *Garth v. McCampbell*, 10 Mo. 154; in Maine and Massachusetts, unless the sheriff takes an assignment from the plaintiff, the judgment [*252] is extinguished, but if he does, it is not. *Whittier v. Heminway*, 22 Me. 238; *Allen v. Holden*, 9 Mass. 133; *Dunn v. Snell*, 15 Mass. 481. So in Georgia, *Arnett v. Cloud*, 2 Ga., 53; and perhaps in some other states.

The foundation of all these cases seems to be that of *Reed v. Pruyn*. In that case the sheriff having a *ca. sa.* against Staats, under which Staats was arrested, procured him and Pruyn to confess a judgment in favor of the plaintiff for a larger sum, and the sheriff paid the amount of the execution to the plaintiff. In a few days he took out a *ca. sa.* on the judgment confessed by Staats and Pruyn, and took their note for a still larger sum, and gave them a receipt for the amount of the first judgment. Afterwards the sheriff advertised the property of Pruyn and Staats for sale under an execution upon the judgment confessed, and they moved to set aside the execution, and

for an entry of satisfaction on the judgment confessed. The court granted the motion, and there can be no doubt was right in doing so.

A sheriff who has an execution against a defendant and as the price of indulgence takes from him a judgment confessed, or a note, for a larger sum, is guilty of oppression and a breach of official duty, and on grounds of public policy such judgment confessed, or note, must be held void, notwithstanding the sheriff has paid the plaintiff in the original judgment the amount of his claim. And *a fortiori* any acts of the sheriff after he had acquired his interest, under an execution whether issued upon the original judgment confessed, were in like manner void as to the defendant in the execution. This last proposition has long been settled. Bat. Rev. chap 25, Coroner; chap, 106, Sheriff; *McLeod v. McCall*, 3 Jones L. 87; *Stewart v. Rutherford*, 4 Jones L. 483. And the first we conceive to be equally clear upon general principles. See also Bat. Rev. chap. 106, sec. 17.

Kent, C.J., in delivering the opinion of the court (after citing the cases of *Waller v. Weedale*, Noy. (Eng.) 107; *Langdon v. Wallis*, [*253] E. Lutw. folio, p. 587, Eng. Ed. vol. 1, p. 223; *Speake v. Richards*, Hob. 206, and *Ward v. Hauchet*, 1 Keb. 551), says, "The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court shall not use its process as the means of making unequal bargains, and taking undue advantage. The facts in this case have the appearance of an instance of gross abuse."

He concludes by saying, "I am happy therefore that the sheriff will be driven to seek his remedy upon the note, when the legality of the increase of the original debt will be open to further investigation."

We think that in the subsequent cases in New York, and in the others elsewhere that have followed this case, the opinion of the eminent judge has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case, has been converted into a general and arbitrary rule.

In the present case, the sheriff having an execution against the defendant paid it to the plaintiff in his own exoneration and

took an assignment on the execution to his son, whether as a trustee for himself, or as a gift to the son, is not material. He now moves that an *alias* execution may issue to his successor in office, for his benefit. There has been no oppression as there clearly was in the case of *Reed v. Pruyn*, and the debt has not been increased.

We are at a loss to conceive what public policy will be violated if the motion is allowed.

It is said that if a sheriff can escape amercement by paying an execution which it was his duty to collect, he will be induced to delay enforcing executions, and creditors may be injured. The creditor cannot be injured if the debt is paid. [*254] And it cannot be a wrong to the debtor if a sheriff who, relying perhaps on his promise to pay the money by the return day, has made himself liable by his indulgence, is allowed after payment to stand in the position of the creditor. If public policy forbids such payments by sheriffs, and for that reason the judgment is extinguished, it would seem that the same principle would forbid any recovery by the sheriff of the money so paid by him. But the principal case we have commented on holds that the sheriff might sue upon the note which he had taken and recover what might be just.

It is also said in *Roundtree v. Weaver*, that the sheriff in an action against the defendant can recover the money paid for his benefit. And in *Lintz v. Thompson* it is said that if the sheriff is compelled to pay the debt by a judgment of a court, there is an implied transfer of the plaintiff's debt to him. These cases thus acknowledged that it would be inequitable for a defendant to receive the benefit of the sheriff's payment, and refuse to reimburse him. It is true that the defendant did not previously request the sheriff to pay the debt, and that in general no one can make himself the creditor of another by officious service, or by officiously paying a debt for him. But where a sheriff, at the express or presumed request of a defendant in execution, indulges him so that the sheriff is compelled to pay the debt, there is a clear equity for reimbursement. The acceptance of the discharge of the original debt by the defendant in execution, may be considered as a ratification of the sheriff's act, and as equivalent to a prior request. It is somewhat like a case where one accepts a draft about to be protested for non-acceptance, for the honor of the drawer. If this equity for reimbursement be admitted as a foundation for an action, why is it illegal and against public policy for the sheriff to take an assignment of the execution, which gives him no more than he would have a right to recover?

The form of the recovery is not an essential part [*255] of the equity, and there is no reason why the sheriff should be put to the circuitry of an action.

It has been seen that in Maine and Massachusetts it is held that where the sheriff takes an assignment of the judgment from the plaintiff in execution, the judgment is not extinguished. The decisions in those states support our decision in the present case. We think also that they imply that it is not against public policy for a sheriff to pay off a debt in his own exoneration; for if it were, an assignment would not be sustained.

We concur with the judge below, that the motion should be allowed. Let this opinion be certified.

Per Curiam.

Judgment affirmed.

"If a sheriff shall pay the amount of an execution to discharge himself * * * the defendant may avail himself of such payment to have the judgment satisfied, but he thereby becomes liable to the sheriff for the money paid for his use." *Poe v. Dorrah*, 20 Ala. 288, 51 Am. Dec. 196.

In any action of debt for the benefit of the officer against the debtor, it is no defense that the judgment had been paid by the sheriff. *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46.

BONES v. AIKEN AND POWELL, in Iowa Sup. Ct., Dec. 18, 1872—
35 Iowa 534.

Petition by Bones to restrain the enforcement of judgments against himself and Aiken as partner, recovered after the dissolution of the partnership. Aiken had taken assignments of the judgments and procured executions thereon, which Powell as sheriff was about to levy on the individual property of Bones. A preliminary injunction was issued, and upon hearing was dissolved as to one of the judgments. Plaintiff appeals.

MILLER, J. * * * As ground for dissolving the injunction issued the defendant Aiken showed that in the articles of dissolution of the partnership the plaintiff had agreed to pay the claim of Wellington Bros. & Co. and to release Aiken from his liability thereon, and that plaintiff failed to pay the claim; and under and by virtue of such agreement Aiken claimed that he was but a surety, and as such purchased the judgment and took an assignment thereof. It is urged in argument that as between the plaintiff and Aiken the latter was not liable on the judgment, and could therefore purchase the same as any other person and enforce it against the plaintiff. Appellees' counsel cite no authority in support of this proposition.

On the other hand, it is well settled that at law the payment of a judgment to the plaintiff or owner by one [*536] of several defendants extinguishes it, even though such payment be made by a defendant who is mere surety. So also an assignment by the plaintiff or owner of the judgment to one of several defendants in the judgment works the same consequence. *The Bank of Salina v. Abbott*, 3 Denio 181; *Ontario Bank v. Walker*, 1 Hill 652.

If Aiken be but surety he may, perhaps, on making a proper case, be entitled in equity to be subrogated to the rights of the judgment plaintiffs. But in law the judgment is extinguished, and no execution can issue thereon as such, though Aiken might have an action at law to recover the money paid, based on the plaintiff's agreement.

The judgment being satisfied, the execution was void and conferred no power on the sheriff to levy on plaintiff's property.

The judgment, therefore, must be reversed.

COLE, J., dissenting. It is apparent from the whole case, and, indeed, it is not controverted, that as between the plaintiff and the defendant Aiken, the plaintiff ought to pay the judgments; that by the terms of their dissolution the plaintiff had agreed to pay the debts for which they were rendered. In equity, then, plaintiff is bound to pay them, and a court of equity would compel him so to do. Now, while in a court of law, the defendant may not have the right to enforce payment by execution (and that is the precise point ruled in the cases cited in the foregoing opinion), yet the plaintiff has brought this action in a court of equity, and asks that court to enjoin the defendant from compelling him to pay a debt, which in equity he ought to pay. In such case the elemental rule is that he who asks equity must himself first do equity. The plaintiff must pay the debt which, in equity, he owes, before he can properly ask a court of equity to interfere. A court of equity will not enjoin legal process, which can [*537] effectuate no injustice. To first enjoin the legal process, and then grant the same relief in equity is a work of supererogation. For this reason I think the judgment should be affirmed.

A perpetual injunction was awarded on similar facts in *Hinton v. Odenheimer*, 4 Jones Eq. (N. Car.) 406.

The general rule is that when a judgment is recovered against several equally bound to pay, none can make use of the judgment to compel contribution by taking an assignment of it to a third party instead of paying it, *Boyer v. Bolender*, 124 Pa. St. 324; *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46; *Adams v. Drake*, 65 Mass. (11 Cush) 504; *Stanley v. Nutter*,

16 N. Hamp. 22; *Klippel v. Shields*, 90 Ind. 81; for the assignment operates as a satisfaction. And the same rule was applied against sureties in both of the cases cited in the principal case above, as it has been in many others. *Preslar v. Stallworth*, 37 Ala. 402.

But there are a few cases, some of them due to statutes, sanctioning the use of execution in this way to enforce contribution from co-debtors (*Coffee v. Tevis*, 17 Cal. 239; *Huckaby v. Sasser*, 69 Ga. 603; *Campbell v. Pope*, 96 Mo. 468; *Thornton v. Damm*, 120 Mich. 510, 79 N. W. 797; *Ankeny v. Moffett*, 37 Minn. 109; *Durand v. Trusdell*, 44 N. J. L. 597); or payment by the principal to the surety who has paid. *Giddens v. Williamson*, 65 Ala. 339; *Montgomery v. Vickery*, 110 Ind. 211; *Zimmerman v. Gaumer*, 152 Ind. 522; *Harris v. Frank*, 29 Kan. 200; *Barringer v. Boyden*, 7 Jones Law (N. Car.) 187; *Harbeck v. Vanderbilt*, 20 N. Y. 395. And in case of payment by a surety, if he has no right to execution at law, he is entitled for that very reason to subrogation in equity without taking any assignment. *Dempsey v. Bush*, 18 Ohio St. 376; *Flemming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *McClung v. Beirne*, 10 Leigh (Va.) 394, 34 Am. Dec. 739; *Chandler v. Higgins*, 109 Ill. 602; *Wilson v. Burney*, 9 Neb. 39; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *McKenna v. Corcoran*, 70 N. J. Ch. 627, 61 Atl. 1026.

If two are equally and jointly bound to pay a debt and one pays the whole judgment he is entitled to be subrogated to the rights of the judgment creditor to reach property in the hands of an assignee of the other debtor. *Sands v. Durham* (1901), 99 Va. 263, 38 S. E. 145, 86 Am. St. Rep. 884.

McCARVER v. NEALEY, in Iowa Sup. Ct., May Term, 1848—1 G. Greene (Iowa) 360.

Bill in equity by Nealey against McCarver, and Todd & Sons, praying for injunction. From decree granting the injunction as prayed defendants appeal.

GREENE, J. On the 4th of June, 1841, a judgment was rendered against James W. Nealey in favor of Morton M. McCarver, for the sum of \$155.47. On the same day an assignment of it, purporting to be for value received, was made upon the margin of the judgment to Ira Todd and Sons. It appears that Joseph D. Learned, Esq., was the plaintiff's attorney of record. He caused execution to be issued, and thereupon entered into an arrangement with Nealey, by which [*361] he, as attorney, gave him a receipt in full discharge of the judgment. Subsequently Todd and Sons, the judgment assignees, procured the issue of another execution, which was enjoined by the proceeding now before us, upon the complaint of Nealey v. McCarver and Todd & Sons. Upon a full hearing in the district court the injunction was decreed perpetual, and an appeal thereon taken to this court. * * *

It is contended that Learned's authority as attorney of record

ceased on the rendition of the judgment; and that he had no right to receive the pay or give a receipt in satisfaction. The practice of Kentucky is referred to in support of this position. It has been the recognized custom, since our first territorial organization, for attorneys to control demands placed in their hands till finally collected. This custom was recognized by an early statute, which conferred the exclusive authority upon the attorney of record for the judgment claimant to enter satisfaction. On obtaining a demand from a client, it is usually specified in the receipt given by the attorney that the demand is taken for collection. This rule has been so generally recognized and adopted in Iowa, that to reverse it might work great [*362] injustice to parties. But it is alleged that, even if he should be regarded as the attorney of McCarver after the rendition of judgment, his authority as such was not transferred to Todd and Sons after the assignment, unless recognized by them; and that, therefore, the payment of the judgment to him was unauthorized, and should not release Nealey. This conclusion we should recognize as correct, if it appeared that Nealey had received notice of the judgment assignment. Without notice, he should be protected as an innocent party to the transaction.

The testimony of J. W. Nealey, in reply to defendants' interrogatories, discloses that Learned received in payment from him a demand against himself for about fifty dollars, an order on one Russell for an unknown amount, which was paid, and the balance in money.

The principle is not controverted that an attorney has no right to receive anything but money in satisfaction of a demand placed in his hands for collection, unless especially authorized to do so by his client. And it is equally well settled, that if he applies such a claim in payment of his own debts, his client is not bound thereby, and may still proceed against the defendant. *Gullett v. Lewis*, 3 Stew. 23; *Cost v. Genette*, 1 Porter 212; *Craig v. Ely*, 5 Stew. and Porter 354; *Tankersley v. Anderson*, 4 Desaus. (S. Car.) 45; *Smock v. Dade*, 5 Rand. (Va.) 639; *Langdon v. Potter*, 13 Mass. 319.

We find it difficult to ascertain the precise amount that Learned, as attorney, received in money on the payment of the judgment. His deposition states that it was settled by setting off a demand which Nealey had against him. From the responsive answer of Nealey, to which, from the state of the testimony before us, we give particular credence, it is rendered quite certain that all but about fifty dollars was paid in money. The order on

Russell for cash of Nealey's was paid and should be regarded as so much money in the hands of Learned.

It is therefore our opinion, that Ira Todd and Sons are entitled to recover from James W. Nealey, on the execution, the sum of fifty dollars, and that the injunction be so far dissolved [*363] as to enable the recovery thereof, and rendered perpetual as to the balance of said judgment and execution.

The decree of the district court, declaring the injunction perpetual, will be changed in conformity with this opinion.

The cases are generally in accord with the above. In the following cases the judgment creditors were held bound by payments made to the attorney who recovered the judgments, though no proof of authority to collect was made and the money was never received by the judgment creditors. *Erwin v. Blake*, 33 U. S. (8 Peters) 18; *Wyckoff v. Bergen*, 1 N. J. L. (Coxe) 248; *Black v. Drake*, 2 Colo. 330; *Baltimore & O. Ry. Co. v. Fitzpatrick*, 36 Md. 619; *Gray v. Wass*, 1 Me. 257; *Frazier v. Parks*, 56 Ala. 363. To the same effect see also: *Harper v. Harvey*, 4 W. Va. 539; *Miller v. Scott*, 21 Ark. 396; *Wheeler v. Alderman*, 34 S. Car. 533, 13 S. E. 673.

In *BRACKETT v. NORTON*, 4 Conn. 517, 10 Am. Dec. 179, an attorney sued for services rendered in prosecuting a suit against an officer for neglect of duty in collecting execution on a judgment recovered by plaintiff as attorney for defendant. Plaintiff was allowed to recover for such services without proof of employment except to prosecute the first suit. The authorities on the power of an attorney after recovery of judgment are reviewed at length.

A judgment defendant, having procured an execution to issue against himself, paid the sheriff the amount in state bank paper and received a discharge. The paper proving worthless the plaintiff asked to have the satisfaction set aside which the court allowed, saying:

"It may be of the utmost importance to the plaintiff to know when his execution is in the hands of an officer, that he may give such instructions as are consistent with his rights. He may desire to bid for the property levied on, so as to realize his judgment and prevent the property from being bought in at a sacrifice and his judgment left unpaid. To give to the defendant or any third person the right of controlling an execution without the privity of the plaintiff, would establish a rule full of mischief which might lead to the practice of the grossest fraud." *Osgood v. Brown*, Freem. (Miss.) 392.

PIPER v. ELWOOD, in N. Y. Sup. Ct., Albany, Jan. Term, 1847—4 Denio (New York) 165.

Action in justice court by Elwood against Piper on a judgment of a justice of the peace. From judgment of the court of common pleas on *certiorari* affirming the judgment of the justice in favor of plaintiff, defendant brings error.

Defendant claimed the judgment sued on was satisfied, as it appeared that an execution was issued thereon and levied on defendant's horse, which was sold by the constable for enough to satisfy the execution, and it was returned satisfied. But plaintiff showed, that defendant had sued him and recovered the value of the horse, because it was exempt from execution.

BRONSON, C.J. The defendant defeated the effect of the levy and sale, by suing for and recovering the value of the property. The first judgment thereupon revived, and might be enforced. If the judgment had been in a court of record, the plaintiff would have been allowed to amend or strike out the return on the execution, and to have a new execution. *Adams v. Smith*, 5 Cowen, 280. As the justice had no power to order such an amendment, an action on the judgment was the appropriate remedy.

Judgment affirmed.

Debt has been sustained on a judgment of a justice of the peace though execution had been issued thereon, and the constable's return showed levy and satisfaction. Parol evidence was held competent in such action to show that the return was false. *Hutchinson v. Greenbush*, 30 Me. 450.

In Texas debt on judgment of a court of record satisfied by sale of land on execution was sustained, on proof that the levy and sale were fatally defective. *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400. Debt on judgment after levy of execution under it was held not maintainable where defendant's title was perfect, but plaintiff failed to record the levy. *Lawrence v. Pond*, 17 Mass. 433. Entry of satisfaction being conclusive in all collateral proceedings, held that debt would not lie, but only *scire facias* or the like. *Pratt v. Jones*, 22 Vt. 341; *Grosvenor v. Chesley*, 48 Me. 369.

HUGHES v. STREETER, in Ill. Sup. Ct., April Term, 1860—24 Ill. 647, 76 Am. Dec. 777.

Motion by John Hughes to quash an execution on a judgment against him in favor of Samuel Streeter, on which a previous execution had been returned: "Made * * * the amount of this judgment, interest and costs." From order denying the motion, Hughes brings error.

WALKER, J. The rule has been uniform both in this country and Great Britain, that after a satisfaction of a judgment by the sale of property, no further execution can issue upon the judgment, until the satisfaction is vacated, the levy and sale set aside, and an execution awarded by an order of the court in which the judgment was rendered. No case has been referred to, and none is believed to exist, in which a clerk has ever before issued an

execution on a judgment thus satisfied. And it is for the plain and manifest reason, that his duties are only ministerial, while the setting aside a levy, or a sale, or the vacating the entry of satisfaction of a judgment, is a judicial act. When the plaintiff has sold property in satisfaction, his judgment ceases to exist, and when the record entry of its satisfaction is vacated, it is thereby revived, and receives new vitality. The exercise alone of a judicial power, equal to that which first made the decision, can impart this new life to a judgment which has once been satisfied by an officer or person clothed with power to make the entry. The hearing the evidence and finding the facts on the motion, is as purely judicial, as is the ascertaining the amount of the indebtedness, and rendering the judgment in the first place. The clerk might as well assume the one jurisdiction as the other, and the exercise of either is wholly unwarranted.

We have, however, been referred to the case of the *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373, as an authority to sustain the practice. That was a case where an agent of plaintiff, through mistake, entered a credit on the execution, and the clerk issued an alias for the full amount of the judgment. That case stands, so far as we can find, solitary and alone, and no rule of law is referred to in support of the authority of the clerk, and the court, in the opinion, very properly discourages the practice. The facts of that case are not the same as in this, and even if they were, we should not be inclined to follow it as a precedent, or as authority, since we believe that it is opposed to the uniform practice, and is not sanctioned by the common law, is unauthorized by statute and in violation of our constitution, which has vested all judicial power in courts, and [*650] not in ministerial officers. We are therefore clearly of the opinion that the court erred in not quashing the *alias* execution, as its issue was not warranted until the satisfaction, the levy, and sale, had been set aside by the judgment of a court of competent jurisdiction. * * *

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Accord: *Haden v. Walker*, 5 Ala. 86; *Tudor v. Taylor*, 26 Vt. 444; *Laughlin v. Fairbanks*, 8 Mo. 367; *Wilson v. Stilwell*, 14 Ohio 467.

The decision in *Richardson v. McDougall*, 19 Wend. (N. Y.) 80, to the effect that new execution on a satisfied judgment may issue without any order of court, if property sold proves not to belong to the judgment debtor, is clearly induced by admission of counsel and without reflection, for Cowen, J., says: "It is not denied that execution might well have issued had it not been for the *scire facias*."

Garnishment on a satisfied justice judgment was held not sustainable though the satisfaction was by sale of property of a stranger to whom plaintiff had made restitution, and the justice had "annulled" the satisfaction before the garnishment trial. *Masterson v. Keller* (1905), 40 Tex. Civ. App. 333, 89 S. W. 803.

WATSON v. REISSIG, in Ill. Sup. Ct., April Term, 1860—24 Ill. 282, 76 Am. Dec. 746.

Motion by Charles Reissig to set aside and vacate an entry of satisfaction of a judgment in his favor against Alonzo Watson. From an order granting the motion defendant brings error.

The satisfaction was entered on return of execution on the judgment, stating that lots two and three of Wheaton's Addition to the town of Wheaton had been levied thereon and sold to the plaintiff in the judgment for the amount of the judgment and costs.

CATON, C. J. The law is too well settled to admit of discussion, that a court of law may exercise an equitable jurisdiction over the execution of its own judgments and process, but it does not follow that it will always exercise such jurisdiction, and indeed it will refrain from doing so, when from any circumstance, it cannot do as complete justice as could a court of equity, but will leave the parties to seek relief in that court. We shall see whether this record presented such a case as justified the court of law in exercising such an equitable jurisdiction. * * * [*285] * * * The facts may be stated in a very few words. The property had been previously sold on the Savage execution, and there only remained in the judgment debtor a right of redemption. This was levied upon and sold by virtue of this execution, and bid in by, or for, the judgment creditor, and upon that bid and for that consideration, satisfaction of the judgment and execution was entered. And whether this sale and satisfaction should be set aside, was the real question to be determined.

In the case of *Merry v. Bostwick*, 13 Ill. 398, it was decided by this court, for reasons which we think entirely satisfactory, that the right of redemption which is by our statute vested in the judgment debtor for twelve months after a sale of real estate under a decree or an execution, is not subject to be levied upon and sold, by virtue of another execution against the judgment debtor. Hence this levy and sale conferred no right or title to the purchaser. It was entirely void, and the satisfaction was entered without any shadow of consideration whatever. In such a

case it was not only proper, but it was the duty of the court to set aside, or vacate the entry of satisfaction, and to issue another execution under which the judgment creditor might redeem from any sale where the law would permit it, or otherwise seek a real satisfaction of his judgment.

The order of the court below is affirmed.

Order affirmed.

After satisfaction of record had been entered for a year erroneously, the entry was vacated, the court saying that there is no time limit for correcting the record. *Acme Harvester Co. v. Magill*, 15 N. Dak. 116, 106 N. W. 563.

In other states it has been held that the debtor's right of redemption is an interest liable to levy and sale on an execution or attachment against him. *CURTIS v. MILLARD & Co.*, 14 Iowa 128, 81 Am. Dec. 460; *Herndon v. Pickard*, 73 Tenn. (5 Lea) 703.

FREEMAN v. CALDWELL, in Pa. Sup. Ct., 1840—10 Watts 9.

Scire facias by James D. Caldwell against Brewster Freeman, to obtain execution on a judgment against said Freeman, which had been satisfied by a sale to plaintiff on *fi. fa.* of cattle which turned out not to belong to Freeman and were afterward replevined by the owners. From an order granting new execution defendant brings error.

GIBSON, C. J. In judicial sales there is no warranty. The principle is universal, but particularly recognized by us in judicial sales of land, which we treat as a chattel for payment of debts: and it is of course equally applicable to the judicial sale of a chattel pure. What interest in it does the sheriff propose to sell? Not a title to it, but the debtor's property in it, whatever it may be; and the vendee, where the thing has been recovered from him, has no recourse to the price of it in the hands of the sheriff or the creditor's pocket. In the case of *The Monte Allegre*, 9 Wheat. 616, it was ruled that a loss sustained by the marshal's vendee of a rotten article, sold by a sample with which it did not correspond, should not be made good out of the proceeds in court. Why shall not the same principle be applied to a purchase by the judgment creditor himself? By his bid he may have prevented a sale to a stranger who could have had recourse to no one; and thus have deprived the debtor of the benefit of his doubtful title, which may have been a legitimate subject of value. In the one case and in the other, the produce of it has, in contemplation of law, been brought into court and distributed; and

the matter has consequently passed *in rem judicatam*. * * *

[*12] Before the 32 Hen. VIII., there was no re-extent upon an eviction of a tenant by *elegit*. "*Nota*," says Lord Coke, 2d Inst. vol. 1 p. 190, *a*, "it appears by the preamble of the said act, and by divers books, that after a full and perfect execution had by *elegit* returned and of record, there never shall be any re-extent on any eviction, but if the extent be insufficient at law, there may go out a new extent." Here then is distinctly announced the common law principle which rules the case; and though it has been abrogated in England, so far as regards land, there is no statute on the subject in Pennsylvania. The silence of the repealing act as to chattels, was imputed by Mr. Justice Woobury, in *Whiting v. Bradley*, 2 N. H. 79, to a supposition that creditors could, even then, have a new execution of everything but land; but it is plain, from the special provision of the statute in that case, that the legislature of his own state thought otherwise. Indeed, the statute *Westm. 2*, which gave the writ of *ele-git*, had put land and chattels on a footing in all respects, except the relative quantity which might be levied of each, and the manner of its application to purposes of satisfaction; and it is probable, the reason why the latter were not included in the 32 Hen. VIII., was that the progress of trade had not involved the title to things personal, so frequently in complication and doubt, as to cause much inconvenience from it. * * *

Without power derived from a statute, therefore, I take it the [*13] execution can not be repeated; and though this clear common law principle may be violated, it can not be evaded. It is among the worst symptoms of the judicial epidemic of our day, that the bent of the professional mind is towards oral testimony in preference to record and written proofs. What motive could there be, were it allowable on principle, to overturn the record in this instance? The plaintiff's case may be thought a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee who is deprived of the property by title paramount, shall have his money again, would destroy all confidence in the stability of judicial sales. He takes upon him a risk which may lead to his disadvantage; but he does so at the premium of a reduced price. Were it not for this risk, a plaintiff might safely depreciate the defendant's title, and buy it in at a sacrifice. If it proved good, he would have it at an undervalue; but if bad, he would be only where he began. His interest, instead of being promoted by a sale for an outside price, would be to have the property sacrificed; and it is impoli-

tic to encourage a principle which would make him a speculator. In this respect, an advantage over the other creditors would be, not only unjust to them, but ruinous to the debtor. On grounds of reason and authority, therefore, he ought to stand as any other purchaser.

Judgment reversed.

This is the case usually cited by those who maintain this view, and it fairly represents their argument. To the same effect see *Vattier v. Lytle*, 6 Ohio 482; *Thomas v. Glazener*, 90 Ala. 537, 8 South 153. 24 Am. St. Rep. 830; *Halcombe v. Loudermilk*, 3 Jones (N. C.) 491; and *Jones v. Burr*, 5 Strobb. (S. Car.) 147, same case 53 Am. Dec. 699, in a note to which Mr. Freeman reviews a large number of decisions. In his work on executions he says: "Upon this question the authorities are clearly irreconcilable." Freeman Ex. § 54. But from the following cases the clear weight of authority, and as it seems to me of reason also, will be seen to be against *Freeman v. Caldwell*. In many states a remedy is given by statute. But let us review the decisions not depending upon statute.

In the following cases satisfaction was set aside and a new execution given because the property sold subject to a mortgage was worth less than the incumbrance. *Kimports v. Oberholtzer*, 111 Iowa 744, 82 N. W. 1012; *Osborne v. Miller*, 37 Minn. 8, 32 N. W. 786; *Hollon v. Hale*, 21 Tex. Civ. App. 194, 51 S. W. 900.

In Connecticut payment being compelled under levy after the return day of the writ and satisfaction entered, the judgment was revived on *scire facias* on proof that defendant had recovered the amount paid. *Stoyel v. Cady*, 4 Day (Conn.) 222. In a later case debt on judgment was sustained though the judgment had been satisfied by levy on land of a stranger, the creditor who purchased at the sale supposing defendant's conveyance to be fraudulent. "In this state the ancient English common law rule has never been adopted; but the practice has uniformly been in conformity with the principle that where there is no real, but only an apparent satisfaction of the execution issued on a judgment, by reason of a mistaken or fruitless levy on lands, debt on judgment, as well as *scire facias*, may be brought to obtain satisfaction." *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371.

In the following cases satisfaction produced by a sale of property which proved not to belong to the judgment debtor was set aside and a new execution on the judgment was awarded on *scire facias* or motion. *Adams v. Smith*, 5 Cowen (N. Y.) 280; *Magwire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121; *Ritter v. Henshaw*, 7 Iowa 97; *Cross v. Zane*, 47 Cal. 602; and in *Tudor v. Taylor*, 26 Vt. 444, the right to new execution on proof of failure of title and the power of the court to set aside the satisfaction were asserted, but the new execution was denied because a presumption of actual payment arose from the delay for 30 years after satisfaction was entered before the motion was made that satisfaction be set aside. The propriety of such action is also asserted in *Whiting v. Bradley*, 2 N. H. 79.

The supreme court of Ohio having followed *Freeman v. Caldwell* in *Vattier v. Lytle*, 6 Ohio 478, held that it was no defense to a bill to foreclose a mortgage that the debt thereby secured had been reduced to judgment and the judgment satisfied by a sale on execution of the mortgaged

land which the debtor had sold after the mortgage was recorded but before the levy was made. *Hollister v. Dillon*, 4 Ohio St. 198. There are several cases in which a judgment creditor has been given a decree in equity for the amount of his judgment when defendant's title to the property sold plaintiff on execution to satisfy the judgment has failed. *Warner v. Helm* 6 Ill. (1 Gil.) 220; *Price v. Boyd*, 1 Dana (Ky.) 434; *M'Ghee v. Ellis*, 4 Littell (Ky.) 244, 14 Am. Dec. 124. In *Howard v. North*, 5 Tex. 290, which was a suit to recover land because the sale of it on execution was defective, Hemphill, C.J., in behalf of the court, in an elaborate opinion maintained the right of the purchaser under the execution to retain it till the amount paid by him to defendant's use had been refunded. To same effect see *Meher v. Cole*, 50 Ark. 361.

CAVEAT EMPTOR. It cannot be disputed that *caveat emptor* applies to all purchasers at judicial sales as stated by Gibson, C.J. That is to say, there is no implied warranty either of quality or title by either the judgment debtor, judgment creditor or the officer making the sale. If the quality is deficient it is the purchaser's loss, as was held in the case cited by Gibson, C.J., above. If a stranger has purchased at the sale and title has failed, clearly he can have no recourse to the judgment creditor (*England v. Clark*, 5 Ill. (4 Scam.) 486; *Dunn v. Frasier*, 8 Blackf. (Ind.) 432), nor against the officer making the sale. The officer has done what he was bound to do and no more, and no implied warranty of anything can be imputed to him. And as to the judgment creditor the execution, which is said to be the end of the law, would be of little use to him and a dangerous thing if he were liable to an implied warranty of the property sold on it. It has even been held that the person buying cannot resist payment of the amount of his bid on the ground that defendant had no title and therefore the consideration had failed, for he purchased only a quitclaim. *M'Ghee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124; *Farmers' Bank v. Peter*, 76 Ky. (13 Bush) 591; *Humphrey v. Wade*, 84 Ky. 391; *Cameron v. Logan*, 8 Iowa 434; *CONTRA, Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460. If the money is in the hands of the clerk he cannot have it back. *Dunn v. Frasier*, 8 Blackf. (Ind.) 432.

RIGHT OF PURCHASER TO REIMBURSEMENT.—But although there is no implied warranty by the defendant in the execution it does not follow that he is not bound to pay the purchaser the amount he has paid and which has gone to satisfy the defendant's debts. Accordingly we find numerous decisions to the effect that one who, being a stranger to the proceedings, has paid money at an execution sale for property which did not belong to the defendant in the execution, may recover the amount in an action against the judgment debtor either at law or in equity, though no fraud is imputed to him. *Preston v. Harrison*, 9 Ind. 1; *McLaughlin v. Daniel*, 8 Dana (Ky.) 182; *Johnson v. Caldwell*, 38 Tex. 218; *McLean v. Martin*, 45 Mo. 393.

The creditor having bid enough at the sale to satisfy the judgment, the sheriff sold the property to him; but on learning that the property was incumbered for nearly its full value, the creditor withdrew his bid the day of the sale. The sheriff made return of these facts. A new execution was issued, a levy made, and the property sold to the creditor. This sale was declared void in an action in chancery by the defendant. *Downard v. Crenshaw*, 49 Iowa 296.

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